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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~530~~ 21

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, MURRAY, ALDRICH & ROBERTS, EDWARD J. PATTERSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1929
CERTIORARI GRANTED JANUARY 20, 1930

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals for the Second Circuit

JACKSON BARNETT, A MENTAL INCOMPETENT, BY ELMER S. Bailey, his prochein ami, plaintiff
against
THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE American Baptist Home Mission Society, defendants

UNITED STATES OF AMERICA, APPELLANT

THE EQUITABLE TRUST COMPANY OF NEW YORK; MURRAY, Aldrich & Roberts; Edward J. Patterson, J. Frederick Eagle, William Greenough, Sherman Day, Carroll G. Walter, and Dodge L. Marks, composing the firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster, and R. B. F. Hummer, composing the firm of Hummer & Foster; Almond D. Cochran, surviving partner of the firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, composing the firm of McCrory & Monk; and Elmer S. Bailey, individually and as prochein ami of Jackson Barnett, appellees } E-31/91

Statement under rule 13, subdivision 4

This suit was commenced on January 22, 1925, by the filing of the original bill of complaint.

The names of the original partners were: Jackson Barnett,
2 a mental incompetent, by Elmer S. Bailey, his prochein ami, plaintiff, and the Equitable Trust Company of New York, and the American Baptist Home Mission Society, defendants.

United States of America became a party before this appeal was taken by the filing of a petition of intervention pursuant to leave of court.

There has been no other change of parties except that the law firm of Murray, Aldrich & Roberts, solicitors for defendant The Equitable Trust Company of New York, made a motion for an allowance, which motion was denied by the decree here appealed from.

An amended bill of complaint was filed on May 7, 1925.

The answer of both defendants thereto were filed on June 26, 1925.

The intervening petition of the United States of America was filed on January 29, 1926.

The answers of the defendants to said intervening petition was filed on March 10, 1926.

The amended petition of intervention of the United States was filed on April 23, 1926.

Neither defendant was arrested, no bail was taken, and no property was attached or arrested.

The trial was had before Hon. John C. Knox, district judge, on November 16, 17, 18, 19, 22, 23, and 24, 1926.

No question was referred to a commissioner, master, or referee.

A final decree on the merits was entered on November 21, 1927.

An appeal from said decree, taken by the American Baptist Home Mission Society, was dismissed by an order of this court filed May 14, 1928.

3 The decree on the mandate of this court was entered in the District Court on May 28, 1928.

An application by the defendant mission society to the Supreme Court of the United States for a writ of certiorari was denied by said Supreme Court on October 22, 1928.

Motions by the plaintiff's counsel and the prochein ami for allowances for their services and disbursements were made on November 9, 1928, and were heard before Hon. John C. Knox, district judge.

The decree upon said applications (being the decree appealed from), was made on January 8, 1929.

This appeal was taken on January 22, 1929.

4 In United States District Court, Southern District of New York

JACKSON BARNETT, A MENTAL INCOMPETENT, BY ELMER S. Bailey, his prochein ami, plaintiff
against
THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE American Baptist Home Mission Society, defendants } E-31/91

Amended bill of complaint

To the honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity:

The above-named plaintiff, a citizen of the State of Oklahoma, brings this his amended bill of complaint in equity by Elmer S. Bailey, a citizen of Oklahoma and his prochein ami, against the above-named defendants, The Equitable Trust Company of New York and the American Baptist Home Mission Society, each of which is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having its principal office in and being an inhabitant of the Southern District of New York, and said plaintiff thereupon shows unto the court and upon information and belief alleges:

5 First. The names, citizenship, and residences of the parties to this bill are as set forth in the foregoing introduction to this bill, and this suit presents a controversy wholly between citizens of different States and the jurisdiction of this court is based upon such diversity of citizenship.

Second. Jackson Barnett is approximately seventy-five years of age and at all times herein mentioned he was an imbecile, ignorant.

uneducated, and unable to read or write, and wholly incapable of understanding and comprehending the value, condition, character, nature, and extent of his estate or any part thereof, and incapable of caring for himself and managing his property, and incapable of discerning or appreciating the motives and designs of any person or persons with whom he came in contact, and wholly incapable of comprehending or understanding any of the written instruments, purported trusts, requests, and agreements hereinafter mentioned.

Third. Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians, enrolled opposite roll No. 4254 of the approved Creek rolls, and as such was under the laws and treaties of the United States entitled to an allotment of land in the Indian Territory. Being an incompetent as aforesaid, he failed to make any selection of allotment as provided in said laws and treaties, and there was arbitrarily allotted to him the following-described lands, to wit:

"Southeast quarter (SE. ¼) of section five (5), Township seventeen (17) north, Range seven (7) east, Creek County Oklahoma."

6 Fourth. Prior to April, 1912, the Congress of the United States had conferred upon the County Courts of the State of Oklahoma (which are the courts exercising probate jurisdiction) full and complete jurisdiction of the persons and estates of minors and incompetents, whether Indians, freedmen, or otherwise, and on and prior to said date there were in force in the State of Oklahoma certain statutes of said State, now sections 1449, 1450, 1451, and 4983 of the Compiled Statutes of Oklahoma, 1921, which provide as follows:

"1449. PETITIONS FOR GUARDIANS OF INCOMPETENT OR INSANE PERSONS. When it is represented to the county court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

"1450. GUARDIAN APPOINTED, WHEN. If after a full hearing and examination upon such petition, it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article (chapter) specified.

"1451. BOND AND POWERS OF GUARDIAN. Every guardian
7 appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions, as before prescribed with respect to the guardian of a minor.

"4983. JUDICIAL DETERMINATION OF INCAPACITY. After his incapacity has been judicially determined a person of unsound mind can

make no conveyance or other contract, nor designate any power nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity he may make a will, though his restoration is not thus determined."

Fifth. Pursuant to the acts of Congress and the laws of the State of Oklahoma as aforesaid, proceedings were duly had in the County Court of Okmulgee County (said county being the place of residence of said incompetent and said court having jurisdiction of his person and estate) whereby on the 29th day of April, 1912, said plaintiff was adjudged to be mentally incompetent and Carl J. O'Hornett was appointed guardian of his person and estate. Said O'Hornett thereupon duly qualified and assumed the duties of such guardianship and continued to act in such capacity until the 13th day of June, 1923, at which time he resigned, and Elmer S. Bailey was on said date duly appointed as the successor of the said Carl J. O'Hornett, and said

8 Elmer S. Bailey on said date duly qualified as the guardian of said incompetent and assumed the duties of such guardianship and has been at all times since, and now is, acting in such capacity.

Sixth. At all times prior to October, 1922, the Secretary of the Interior of the United States had construed the acts of Congress as conferring jurisdiction of the estates of minors and incompetent Indians upon the County Courts of Oklahoma and had recognized the jurisdiction of such courts by the rules and regulations of his department, which provide:

"All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be deposited by the Indian agent or other Government officer to whom paid, to the credit of the guardian or curator of such minor or incompetent, in some national bank or banks designated by the Commissioner of Indian Affairs, and may be withdrawn therefrom by such guardian or curator, with the consent of the United States Indian agent, in sums not exceeding $50 per month unless otherwise ordered by the court. Sums in excess of $50 per month may be withdrawn on order of the proper court and not otherwise. Such designated banks shall furnish satisfactory surety bonds, to be approved by the Secretary of the Interior guaranteeing the safe care and custody of the funds so deposited."

Amended July 23, 1910, as follows:

"All royalties, rents, or payments accruing under any lease

9 made for or on behalf of any minor or incompetent shall be held by the United States Indian superintendent, Union Agency, or such other disbursing officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the judge of the County (probate) Court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be

prescribed by the department), or upon authority to said superintendent or other officer in charge of the Union Agency."

Seventh. At all times prior to the transactions hereinafter complained of, Jackson Barnett was recognized as a mental incompetent and Carl J. O'Hornett was recognized as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent for the Five Civilized Tribes, and by all other officers or branches of the Department of the Interior with which he came in contact, and large sums of money held for said incompetent were paid by the Department of the Interior to said guardian for the use and benefit of said incompetent, upon orders of the County Court of Okmulgee County, Oklahoma, and no part of the funds of said incompetent held by the Department of the Interior were paid out by said department other than to or through the said Carl J. O'Hornett as the guardian of said incompetent upon order of said County Court.

10 Eighth. On or about the 22nd day of August, 1912, Carl J. O'Hornett, as guardian of Jackson Barnett, entered into a certain lease contract with H. U. Bartlett, whereby he leased to the said H. U. Bartlett the allotment of said Jackson Barnett above described for oil and gas purposes for a period of ten years from the date of the approval thereof by the Secretary of the Interior and as much longer thereafter as oil or gas should be found in paying quantities. A copy of said lease contract is hereto attached, marked "Exhibit A" and made a part hereof.

Ninth. Said lease contract was made on a form prescribed by the Secretary of the Interior and provided for the payment of the royalties for oil and gas produced therefrom to the United States Indian superintendent, Union agent, Muskogee, Oklahoma, for Jackson Barnett, and said lease was duly approved by the Secretary of the Interior on the 13th day of September, 1912.

Tenth. The office of Commissioner of Five Civilized Tribes and the office of United States Indian superintendent were abolished by act of Congress dated August, 1914, and in lieu of said two separate offices there was created the office of Superintendent for the Five Civilized Tribes.

Eleventh. Pursuant to said lease contract, the lessee and his respective assigns went into possession of said lands and produced oil and gas therefrom in large and paying quantities, and pursuant to the terms and conditions of said lease the royalties and bonuses

11 for oil and gas on said leased premises were paid to the United States superintendent until that office was abolished as aforesaid, and thereafter to the Superintendent for the Five Civilized Tribes, and on and prior to January, 1920, there had accumulated in the hands of the Superintendent for the Five Civilized Tribes from said royalties and bonuses for the use and benefit of said incompetent a large sum of money in excess of one million dollars.

Twelfth. Prior to January, 1920, a number of articles were published in various newspapers and circulated generally throughout the United States concerning Jackson Barnett and his immense wealth, and he became reputed to be the richest Indian in the world.

Thirteenth. Among other persons, one Anna Laura Lowe, who now claims to be the legal wife of Jackson Barnett, heard of said incompetent and his great wealth through said newspaper reports, and she thereupon conceived the idea of kidnapping and marrying him with a view to obtaining his fortune or a substantial portion thereof, and she conspired and agreed with certain persons unknown to this plaintiff to kidnap and defraud said incompetent by various means out of his estate, or a substantial portion thereof, and in pursuance of such conspiracy and fradulent designs, and in or about January, 1920, said Anna Laura Lowe, knowing of said incompetent only through newspaper reports and having never seen him, went to Henryetta, Oklahoma, where she engaged a taxicab and was driven to the home of said incompetent, a few miles distance from
12 said city, and under the pretense that she desired him to show her the residence of a certain Indian she induced him to enter said taxicab and caused the same to be driven to Okemah, Oklahoma, a distance of about twenty miles, the county seat of Okfuskee County, Oklahoma, where she applied for a license to marry said incompetent, but which application was denied; and thereupon said Anna Laura Lowe caused said incompetent to be taken to Holdenville, Oklahoma, a distance of about forty miles from Okemah, and the county seat of Hughes County, Oklahoma, where she again applied for license to marry said incompetent, but which application was denied, and thereupon said Anna Laura Lowe, at the instance of the sheriff of Hughes County, Oklahoma, returned said incompetent to his home.

Fourteenth. Thereafter, and about three weeks later and in the month of February, 1920, said Anna Laura Lowe returned to the home of said incompetent in a high-powered automobile accompanied by one Moorehead and his wife, arriving at the home of said incompetent about midnight, and either by her persuasion and deductive wiles, or by force, or both, induced said incompetent to enter said automobile and caused same to be driven all night, arriving in Coffeyville, Kansas, a distance of about 150 miles, on the following morning, where a marriage license was procured and a purported marriage ceremony performed, purporting to unite said Anna Laura Lowe and said incompetent in holy matrimony; and thereupon said Anna Laura Lowe caused said incompetent to be transported across the border line into the State of Missouri, where another
13 marriage license was procured and another purported marriage ceremony performed, purporting to unite Anna Laura Low and said incompetent in matrimony. Each of said marriage ceremonies is void and of no effect for the reason that said incompetent was an imbecile and incapable of understanding the nature of a marriage contract and incapable of entering into a valid marriage.

Fifteenth. At all times herein mentioned said Anna Laura Lowe intended to deceive and defraud said incompetent of his property and her purpose in kidnapping and entering into a purported marriage with said incompetent was to defraud him of his estate.

Sixteenth. At all times since Anna Laura Lowe took said incompetent from his home and entered into said purported marriage with him she has kept him practically incommunicado, refusing to permit him to see and talk with his guardian, relatives, friends, or members of his race, except on a few occasions in the presence of said Anna Laura Lowe, and for a time after said purported marriage, said Anna Laura Lowe kept said incompetent behind locked doors in a room in a hotel at Coffeyville, Kansas, and refused to permit him to leave except when accompanied by her, and she has at all times since dominated said incompetent and subjected him to her will.

Seventeenth. Said Anna Laura Lowe entered into said purported marriage with said incompetent solely for the purpose of carrying out her designs to acquire possession of his estate, and either
14 prior to said purported marriage or immediately thereafter she employed, among other persons, one Harold C. McGugin, of Coffeyville, Kansas, to aid and assist in securing possession and control of a large part of the estate of said incompetent then held by the Superintendent for the Five Civilized Tribes, and she agreed to pay them a large sum in the event they should be able to secure for her from said incompetent's estate as much as $550,000.00.

Eighteenth. Prior to December 15th, 1922, there had accumulated in the hands of the Superintendent for the Five Civilized Tribes, for the use and benefit of said incompetent, from royalties from oil and gas from his allotment as aforesaid, a sum in excess of $1,100,000.00, which funds had been transferred by the Superintendent for the Five Civilized Tribes to the Secretary of the Interior and by him invested in United States Liberty loan bonds, or said funds had been invested by the Superintendent for the Five Civilized Tribes in United States Liberty bonds and said bonds forwarded to the Secretary of the Interior, all of which, as your plaintiff is informed and believes, was without authority of law.

Nineteenth. During the years 1921 and 1922, and possibly part of the year 1923, one A. J. Ward was Creek national attorney with offices at Muskogee, Oklahoma, whose duty it was to represent the Creek Tribe of Indians in tribal matters and to protect them in their property rights.

Twentieth. Sometime prior to December, 1922, said Anna
15 Laura Lowe, Harold C. McGugin, A. J. Ward, and probably others, entered into a conspiracy for the purpose of extracting from said incompetent's estate a large sum of money, and for the purpose of carrying out said conspiracy said Harold C. McGugin and A. J. Ward went to Washington, D. C., in the month of October or November, where they negotiated with the Commissioner of Indian Affairs, Charles H. Burke, and the Secretary of the Interior, Albert B. Fall, or one of his assistants, and arrangements were made between the said Harold C. McGugin, A. J. Ward, and Commissioner of Indian

Affairs and Assistant Secretary of the Interior whereby United States Liberty loan bonds of the par value of $550,000.00, then held by the Secretary of the Interior for said incompetent, should be delivered to Anna Laura Lowe and whereby other United States Liberty loan bonds of said incompetent of the par value of $550,000.00 should be delivered to the defendant The American Baptist Home Mission Society under a certain purported trust agreement whereby said incompetent should receive a part of the income therefrom during his lifetime.

Thereupon, through communication from Harold C. McGugin, A. J. Ward, or the Commissioner of Indian Affairs to Anna Laura Lowe, she was requested to take said incompetent to Washington, D. C., for the purpose of carrying out the disbursement of the funds of said incompetent as aforesaid, and thereupon said Anna Laura Lowe took said incompetent to Washington, D. C., and induced him to place his thumb mark on a communication addressed to the Secretary of the Interior, through the Commissioner of Indian Affairs, a copy of which is attached hereto as Exhibit B.

16 Said instrument was prepared by A. J. Ward and Harold C. McGugin, or one of them, and was prepared for the purpose of carrying out the previous designs of said Anna Laura Lowe to acquire possession and control of said incompetent's estate, and the provision for the trust fund in favor of the defendant The American Baptist Home Mission Society was inserted for the purpose of giving a color of philanthropy to the entire transaction.

Said incompetent had no part in the negotiation for the distribution of his estate as aforesaid, had no knowledge of the proposed distribution, had never heard of the American Baptist Home Mission Society, had no desire or intention, and was incapable of forming any desire or intention, to distribute his estate as aforesaid, and was incapable of understanding or comprehending the nature, extent, purpose, and effect of such distribution; and said purported communication to the Secretary of the Interior was not read to or explained to him, and he could not have understood or comprehended the meaning, nature, and extent of the same nor of the proposed distribution of his estate had the same been read or explained to him.

Said communication to the Secretary of the Interior is not the act of this plaintiff, but is the act and will of Anna Laura Lowe and her co-conspirators.

The thumb mark of this plaintiff was affixed to said instrument solely through the domination of Anna Laura Lowe, as aforesaid, and at the time of affixing his thumb mark to said instrument, as aforesaid, Anna Laura Lowe was present and surrounded by her counsel and co-conspirators, and this plaintiff did not have the

17 benefit of counsel to represent and advise him, and although negotiations for said distribution were pending for several months all knowledge of the same was kept from the guardian of

this plaintiff, from his attorney, his relatives and friends in Oklahoma, from the County Court of Okmulgee County, Oklahoma, from the United States probate attorney having jurisdiction in Okmulgee County, Oklahoma, and from the office of the Attorney General of the United States.

Twenty-first. Said instrument of gift was presented to the Commissioner of Indian Affairs and by him recommended to the Secretary of the Interior for approval, and the Secretary of the Interior, through his assistant, assumed to approve the same and authorize the distribution of the funds of said incompetent as requested in said communication.

Twenty-second. Pursuant to said purported instrument of gift as aforesaid there were delivered to said Anna Laura Lowe (sometimes designated as Anna Laura Barnett), as part of the funds held by the Secretary of the Interior for the use and benefit of said incompetent as aforesaid, United States Liberty loan bonds of the par value of $550,000.00, and said bonds, to the extent of the par value of $200,000.00, were placed in the Riggs National Bank of Washington, D. C., under a trust agreement between said bank and Anna Laura Barnett, and the balance of said bonds were appropriated to the use of Anna Laura Lowe, her counsel, and co-conspirators.

18 Twenty-third. Pursuant to said purported instrument of gift as aforesaid there were delivered to the defendant The American Baptist Home Mission Society, as part of the funds held by the Secretary of the Interior for the use and benefit of said incompetent as aforesaid, United States Liberty loan bonds of the par value of $550,000, and said defendant thereupon delivered said $550,000 of bonds to the defendant The Equitable Trust Company of New York under an agreement that said Trust Company should hold said bonds or the proceeds thereof as trustee during the life of said incompetent (meanwhile paying all income therefrom in excess of $20,000 in any one year to said The American Baptist Home Mission Society) and upon his death to deliver said bonds or the proceeds thereof to said defendant The American Baptist Home Mission Society.

Said defendant The Equitable Trust Company of New York thereupon received said $550,000 par value of bonds and has continued to hold and still continues to hold the same or the proceeds thereof.

Twenty-fourth. The Secretary of the Interior, under and by virtue of the various acts of Congress of the United States, was wholly without jurisdiction or authority to approve said purported request for distribution of the estate of said incompetent, or to pay out or authorize the payment of said funds to any person other than to or through the legal guardian of said incompetent upon proper order of the County Court of Okmulgee County, Oklahoma.

19 Twenty-fifth. The purported approval of the Secretary of the Interior operated merely as a voluntary surrender of the

possession and supervision of said funds and added no validity to said transaction.

Twenty-six. The Secretary of the Interior was further without jurisdiction or authority to pay out said funds, as requested in said purported communication, for the reason that said funds were paid to the Superintendent for the Five Civilized Tribes solely by virtue of the lease contract entered into by the guardian of said incompetent as aforesaid, and but for the stipulation therein contained that said funds should be paid to the United States Indian superintendent the person occupying that office would have had no right or authority to collect or receive the same; and said provision of said lease is invalid and conferred no right upon the person occupying the office of the United States Indian superintendent or of the Superintendent for the Five Civilized Tribes to collect, receive, or hold said royalties and bonuses, for the reason that said guardian was by law charged with the duty of collecting, receiving, holding, and managing said fund, and was wholly without right or authority of law to delegate such duty to any person whatsoever, and by reason thereof the person collecting, receiving, or holding said funds, pursuant to the terms of said lease contract, held the same as a constructive trustee for said guardian, and upon acquiring possession thereof the Secretary of the Interior held the same as a successful constructive trustee, and the rules and regulations promulgated by the Secretary of the Interior with reference to the collection, holding, and disbursement of funds belonging to restricted Indian lawfully received by the Department of the Interior were wholly inapplicable to the funds in question.

Twenty-seventh. Plaintiff further states that the purported approval of the Secretary of the Interior of the distribution of said funds was procured by misrepresentation of facts made in said communication to the Secretary of the Interior through the Commissioner of Indian Affairs, written at the instance of Anna Laura Lowe and by her employees and co-conspirators.

In said instrument it was falsely and fradulently represented that said incompetent had no living relatives or kindred who, either by ties of blood or by their conduct toward said incompetent, were entitled to any part of his estate or to any consideration from him whatsoever; that no living relative, prior to the time said incompetent became wealthy, manifested any interest in him; that said Anna Laura Lowe was a faithful and loving wife; and that she had shown said incompetent every consideration; whereas this plaintiff alleges and states that in truth and in fact he had living at that time and now has living a half brother, David Barnett, who then and now resides near the city of Henryetta, Okmulgee County, Oklahoma, and is a full-blood Creek Indian; and in truth and in fact said incompetent, prior to the time said incompetent became wealthy, lived with his said half-brother, who cared for him and provided for him until such time as he was able to purchase a home of his own

and provide servants for his care; and in truth and in fact
21 Anna Laura Lowe, at all times since her purported marriage to said incompetent, has kept him in virtual captivity, refusing to permit him to see or communicate with his guardian, his friends, his relatives, and members of his tribe, and all pretended affection bestowed upon said incompetent by Anna Laura Lowe was for the sole purpose of extracting a large sum of money from his estate.

Twenty-eighth. One M. L. Mott was a friend of the Commissioner of Indian Affairs, Charles H. Burke, and such relationship being known to said Anna Laura Lowe and to her counsel and co-conspirators, Harold C. McGugin and A. J. Ward, the said M. L. Mott was employed on behalf of Anna Laura Lowe for the purpose of assisting in consummating the transaction, and he did assist in some manner unknown to this plaintiff and by means of representations the exact nature of which this plaintiff has no actual knowledge; but probably in part on account of the participation of the said M. L. Mott and through his influence the Commissioner of Indian Affairs was induced to accept as true and correct the false statements set forth in said instrument of gift and to recommend the same for approval.

Twenty-ninth. Immediately after the purported marriage of Anna Laura Lowe to said incompetent the Department of Interior caused an investigation of the past life of said Anna Laura Lowe to be made by Secret Service agents, and such Secret Service agents made a detailed report to the Department of the Interior, which report, for a long time prior to said distribution, was on file in the office of the Commissioner of Indian Affiairs, and of which the said commissioner had knowledge.

22 Said report disclosed the state of mentality of said incompetent, describing him as a simple-minded and mentally incompetent and under guardianship, and further disclosed that Anna Laura Lowe, prior to her marriage to said incompetent, was a designing and unscrupulous adventuress, of bad moral character, all of which will more fully appear from the report itself, which this plaintiff is prepared to exhibit upon the trial of this cause.

In recommending for approval the distribution whereby said Anna Laura Lowe (or Barnett) should receive out of the estate of said incompetent the sum of $550,000.00, and whereby the defendants herein should receive another $550,000.00 out of the estate of said incompetent, the Commissioner of Indian Affairs abused has discretion, and the Secretary of the Interior, if he had jurisdiction to approve the same (which this plaintiff denies) and if he had knowledge of the circumstances under which the purported marriage of Anna Laura Lowe to said incompetent took place, of the character of Anna Laura Lowe and of her designs upon the estate of said incompetent, and of his incompetency, and of the manner in which said purported written request was procured, abused his discretion

in approving said distribution, and if the Secretary of the Interior did not have knowledge of said facts his approval of said distribution was procured by fraud, imposition, deceit, and misrepresentation.

Thirtieth. Since said distribution was made the Commissioner of Indian Affairs and the Secretary of the Interior have been fully advised of all the circumstances surrounding said distribution, as herein set forth, and they have been requested to assist in
23 recovering said funds, but that they and each of them have refused so to do, and on the contrary are actively co-operating with and assisting Anna Laura Barnett to establish the validity of said distribution and to prevent the recovery thereof by said incompetent.

Thirty-first. The plaintiff does not know and can not state the exact description, serial numbers, or denomination of said $550,000.00 par value of bonds, but avers that such information is in the possession of the defendants, and plaintiff does not know what part, if any, of said bonds has been sold or redeemed by said defendant The Equitable Trust Company of New York since it received said bonds as aforesaid or the nature of the securities or other property in which the proceeds of any bonds sold or redeemed by said defendant have been invested and avers that such information is in the possession of said defendant.

Thirty-second. Since February 1, 1923, said defendant trust company has collected a large amount of interest upon said bonds, the exact amount of which is unknown to this plaintiff or to his guardian or next friend, and such interest is either still in the possession of said defendant or has been unlawfully disposed of in violation of the plaintiff's rights, of which the said defendants had due notice.

Thirty-third. The defendants and each of them knew, at the time they received said $550,000.00 par value of bonds, that the plaintiff, Jackson Barnett, was the owner thereof and that said plaintiff was mentally incompetent and that a guardian of his
24 person and estate had been appointed by the County Court of Okmulgee County, Oklahoma, and that such guardian was still the duly appointed, qualified, and acting guardian of the person and estate of the said Jackson Barnett.

Thirty-fourth. The defendants and each of them have failed and refused to account for or to pay over to the plaintiff the said $550,000.00 par value of said bonds or the proceeds or interest or income thereof.

Thirty-fifth. The plaintiff has no adequate remedy at law.

Forasmuch, therefore, as the plaintiff is without remedy according to the strict rules of the common law and can have relief only in a court of equity where matters of this kind are properly cognizable, he therefore prays:

1. That the said defendants be required to answer this bill, but not under oath.

2. That the said defendants be required to discover and disclose to the plaintiff the exact description, serial numbers, and denominations of said $550,000.00 par value of bonds; the exact description, serial numbers, and denominations of such of said bonds as shall have been sold or disposed of or redeemed; the amount of all interest and income which said defendants or either of them has received in respect to said bonds; and the exact description of any and all property in which the proceeds, if any, of any of said bonds may have been invested.

25 3. That the defendants be declared to have received and now to hold said $550,000.00 par value of bonds, and the interest, income, and proceeds thereof, and any property, real or personal, in which the proceeds or income of said bonds or any of them may have been invested, as the property of the plaintiff; that the said bonds and the interest, income, and proceeds thereof and any property in which any of the proceeds of said bonds, interest, or income may have been invested be impressed with a trust in favor of the plaintiff; that said defendants be required and compelled to account for said bonds and the interest, income, and proceeds thereof; that the said defendants be required to transfer and turn over to the plaintiff such bonds as are now in their possession, together with the proceeds of such bonds as shall have been sold or redeemed, and all interest and income which have accrued in respect to such bonds since the date of their receipt thereof; and in case the proceeds of any of said bonds have been invested in real or personal property, that said defendants be required to turn over to this plaintiff such real or personal property.

4. That the plaintiff have such other, further, different, and general relief in the premises as the nature or the circumstances of the case may require and as to equity may seem just and proper.

PATTERSON, EAGLE, GREENOUGH & DAY,
Solicitors for Plaintiff,
120 Broadway, Borough of Manhattan, City of New York.

26 CARROLL G. WALTER,
A member of said Firm and one of the solicitors of Record for the Plaintiff.

HUMMER & FOSTER,
Henryetta, Oklahoma,
COCHRANE & ELLISON,
Okmulgee, Oklahoma,
MCCRORY & MONK,
Okmulgee, Oklahoma,
Counsel for Plaintiff.

[*Duly sworn to by Elmer S. Bailey; jurat omitted in printing.*]

27 *Exhibit A to amended bill of complaint—Lease of allotment*

Office of Indian Affairs. Received Sept. 10, 1912. 89551.
Received Mar. 6, 1912. Union Agency. Enclosure to No. 13597.
Received ——— 1912. Union Agency. Enclosure to Cert. No. 1550.
(Original 22449.) Exhibit A.
(Form A, series 1908, approved April 20, 1908. Amended February 6 and June 29, 1911.)

OIL AND GAS MINING LEASE UPON LAND SELECTED FOR ALLOTMENT—CREEK NATION, OKLAHOMA

This indenture of lease, made and entered into in quadruplicate on this 5th day of March, A. D. 1912, by and between Jackson Barnett and joined in by Carl J. O'Hornett, as guardian of the said Jackson Barnett, an incompetent, of Sharp, Oklahoma, enrolled as a full-blood citizen of the Creek Nation, roll No. 4524, party of the first part, hereinafter designated as lessor, and H. U. Bartlett of Mennford, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the act of Congress approved May 27, 1908 (35 Stat. L. P. 312), witnesseth:

28 1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas it found in paying quantities, all the oil deposits and natural gas in or under the following-described tract of land, lying and being within the county of Creek and State of Oklahoma, to wit: The southeast quarter (SE. ¼) of section five, Township 17 N., Range 7 E. of the Indian meridian, and containing 160 acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the lessor, as royalty, the sum of 12½ per cent of the gross proceeds of all crude oil extracted from the said land,
29 such payment to be made at the time of sale or removal of

the oil. And the lessee shall pay as royalty on each gas-producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty which will become effective as a part of this lease; Provided, further, that in case of gas wells of small volume, or where the wells produce both oil and gas or oil and gas and salt water to such an extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or near-by tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises provided there be a surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas-producing well, which can not profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas-producing privileges, the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas-producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease.

Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to the superintendent, Union Agency, Muskogee, Oklahoma, for lessor, as advance annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance, for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifth year, and one dollar per acre per annum, annually, in advance, for such succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from date of approval of this lease by the Secretary of the Interior, or shall pay to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the use and benefit of the lessor, for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other consideration named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligation to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose, to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells, lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled, or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same, and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any building or permanent im-

provements erected thereon during the said term of the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting the tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells which shall remain property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control, nor allow
33 any intoxicating liquors to be sold or given away for any purpose on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum, or in the manner required by the laws of the State of Oklahoma.

6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed, and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property, and upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may at any time, by paying to the Indian superintendent all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligation or liability thereunder: Provided, if this lease has been recorded lessee shall execute a release and record the same in the proper county recording office: Provided, further, in event restrictions are removed from all leased premises, the lessee may surrender all the undeveloped portion thereof, by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms thereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

34 8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, however, That no regulations made after the approval of this lease, effecting either the len'th of term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operation to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof)

shall have the right, at any time after thirty days' notice to the lessee specifying the terms or conditions violated, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said secretary conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In the event restriction on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian superintendent shall thereafter be made to lessor or the then owner of said lands in the person or be deposited to the credit of said lessor or his assigns at the First National Bank of Okmulgee, Oklahoma, or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In witness whereof the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

JACKSON (his mark) BARNETT. [SEAL.]

Attest:

Two witnesses to execution by lessor:

THOMAS J. POWER,
Dist. Agent, P. O. Okmulgee, Okla.

TIM RANDALL,
P. O. Henryetta, Okla.

H. U. BARTLETT. [SEAL.]
CARL J. O'HORNETT, [SEAL.]
As Guardian of Jackson Barnett as incompetent.

By the request of Jackson Barnett I wrote his signature on this instrument and he then affixed his mark in execution thereof in my presence.

N. C. Cox, *Witness.*

Executed in my presence.

TIM RANDALL, *Witness.*

Two witnesses to execution by lessee:
THOMAS J. FOUAR,
P. O. Okmulgee, Okla.
TIM RANDALL,
P. O. Henryetta, Okla.
Witnesses to execution by guardian:
R. S. COTE,
P. O., Muskogee, Okla.
E. J. PHELPS,
P. O. Muskogee, Okla.

37 STATE OF OKLAHOMA,
Muskogee County, ss:

Before me, the undersigned notary public in and for said county and State, on this 22nd day of August, 1912, personally appeared Carl J. O'Hornett, as guardian of the person and estate of Jackson Barnett, an incompetent person, to me known to be the identical person who executed the within and foregoing instrument, and acknowledge to me that he executed the same as his free and voluntary act and deed and in the capacity therein stated for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

EDWIN J. PHELPS, *Notary Public.*

My commission expires Nov. 14, 1912.

That it be approved. See my report of even date.

DANA H. KELSEY,
United States Indian Superintendent.

38 STATE OF OKLAHOMA,
County of Okmulgee, ss:

Before me, N. C. Cox, a notary public in and for said county and State, on this 5th day of March, 1912, personally appeared Jackson Barnett, to me known to be the identical person who executed the within and foregoing lease, and acknowledged that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

N. C. Cox, *Notary Public.*

My commission expires Dec. 17th, 1914.

39 DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE,
Union Agency, Muskogee, Okla., Sept. 7, 1912.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

DANA H. KELSEY,
United States Indian Superintendent.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., Sept. 12, 1912.

Respectfully submitted to the Secretary of the Interior with recommendation that it be approved.

F. H. ABBOTT,
Assistant Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Sept. 13, 1912.

Approved.

LEWIS C. SAYLIN,
Assistant Secretary of the Interior.

Filed for record this 6th day of Mar., 1912, at 1.30 o'clock p. m.
DANA H. KELSEY,
By R. W. FIELD, *C. C.*

Advance royalty received $24.00.
Original.

40 *Exhibit B to amend bill of complaint—Thumb-mark letter*

WASHINGTON, D. C., *December 15, 1922.*

Hon. ALBERT B. FALL,
Secretary of the Interior
(Through the Commissioner of Indian Affairs.)

SIR: The undersigned, Jackson Barnett, a full-blood Creek Indian citizen enrolled opposite No. 4524, for reasons hereinafter stated, hereby makes the following gifts out of that part of his estate consisting of U. S. Liberty bonds and cash now in the custody and control of the Secretary of the Interior and restricted property under the law, such gifts to be effective immediately and absolutely and to be subject to the approval of the Secretary of the Interior, as herein before provided, and subject to such other terms and conditions as are herein imposed:

1. In consideration of love and effection and in appreciation of the faithful performance of her duties to me as my lawful wife I give to Anna Laura Barnett the sum of $550,000, said sum to be her property absolutely and unconditionally.

2. Having been deprived of the benefits of an education in my youth and early manhood and by reason thereof being fully aware of the disadvantages which accrue to one not equipped with an education and especially to the Indian, it is my desire to promote education among my people to the end that the younger generation may not be handicapped by a lack of education. I give to the American Baptist Home Mission Society, a corporation of 23 East 26th Street, New York City, U. S. Liberty bonds in the sum
41 of $550,000, said bonds or the proceeds thereof, if converted into other securities or investments, to be held and retained by said society as a permanent endowment fund for the use and benefit of Indian University, generally known as Bacone College, an Indian school located at Bacone near Muskogee, Oklahoma, and the Murrow Indian Orphans' Home at Bacone, Oklahoma, the income from such endowment to be utilized and distributed between said school and said orphan's home in such proportions as the board of directors or other supervising body of said society may deem proper and for the best interests of said institutions.

In consideration of said gift said society shall be required to pay to the Superintendent for the Five Civilized Tribes at Muskogee, Oklahoma, for my use and benefit the sum of $20,000 annually payable in quarterly installments so long as I shall live. In the event of the removal of restrictions by operation of law or otherwise, prior to my death, such annual income shall then and thereafter be paid to me personally during my life time. To insure the payment of said $20,000 annually as above provided, said society shall be required to furnish suitable guaranties by bond or other legal and binding obligations, to be approved by the Secretary of the Interior.

For your information and for the information of those who may feel inclined to interest themselves in my affairs I here state that I have no living relatives or kindred who either by ties of blood or by their conduct toward me, ar' entitled to any part of my estate or to any consideration from me whatsoever. During the greater part of my life and until I became wealthy through
42 the development of oil on my allotment, which came late in life, no living relative at any time manifested any interest in me or in my welfare whatsoever, and such aid and assistance as I received in my early life came from those who were not bound to me by the ties of blood or otherwise. Since my wealth has became so great and has attracted so much attention, certain persons who until that time were to all intents and purposes strangers to me have from time to time asserted a relationship with me and have attempted to establish themselves with me on a friendly basis.

Indeed I have been reliably informed that some of these persons claiming relationship have already made contracts on a 50% basis with attorneys for the purpose of establishing a right in my estate upon my death. Whatever legal rights these persons may have

when I die, I wish to say now that they have no moral claim upon me nor upon my estate, and I here and now repudiate them one and all and denounce them as being prompted only by an avaricious desire to participate in my estate upon my death.

I have given to my beloved wife, Anna Laura Barnett, a substantial part of my estate. I am doing this for two reasons: First, because since my marriage to her she has conducted herself toward me in a manner which is wholly commendable and above reproach. She has shown me every consideration and through her I have learned, in a measure, to enjoy the wealth which is mine. From an environment of poverty and degradation in which I lived prior to my marriage to her she has taken me against the most powerful and persistent opposition and has placed me in a comfortable home
43 with pleasant surroundings and living conditions somewhat in keeping with my wealth. For all of this I am deeply appreciative, and I feel that in making this gift to her I am but doing that which every consideration of justice and equity requires me to do.

Furthermore, I have reason to believe that upon my death those persons who now claim to be related to me, and who will dou'tless claim a part of my estate, are now planning to attack the right of my wife to any part of my property. In view of her conduct as my wife and the faithful performance of her duties as such, I feel that I should do no less than to protect her against the inconvenience and uncertainty of such a situation by endowing her with a suitable sum sufficient to her needs, so that whatever may occur after I am gone she will be amply provided for.

To the end that these gifts may be consummated, I respectfully request the approval of the Secretary of the Interior thereto and further request that all details in connection therewith be supervised and attended to by the proper officers of the Interior Department to the end that both the gifts and my future income and the welfare of my wife may be adequately protected and my wishes in regard thereto be carried out in full.

Respectfully submitted,

(Sgd.) JACKSON (his # mark) BARNETT.
His right thumb mark.

Witnesses:

(Signed) A. J. WARD,
Creek National Atty.

44 I, the undersigned Anna Laura Barnett, the lawful wife of Jackson Barnett, hereby consent and agree to the gifts made by Jackson Barnett as herein set forth: In this connection I wish to state that as no part of any consideration for the gifts herein made to me, but to further assure a safe maintenance for my beloved husband, Jackson Barnett, my daughter Maxine Sturgees, and myself, I am placing in an irrevocable trust $200,000, by the terms of which an annual income of approximately $8,000.00 is provided, which in-

sures our support if the unfortunate event should come to pass that all other sources of income should fail. The principal sum of $200,000 cannot be diminished during the life time of Jackson Barnett. I am submitting to you said trust agreement, and as an act of courtesy and kindness to me I respectfully request that you and the proper officers of the Interior Department pass upon such trust as to its legality.

Dated at Washington, D. C., this 15 day of December, 1922.

(Signed) ANNA LAURA BARNETT.

12–EMB–15.

45 In United States District Court

[Title omitted.]

Answer of Equitable Trust Co.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity:

The answer of the defendant The Equitable Trust Company of New York to the amended bill of complaint filed herein respectfully shows to the court as follows:

1. Answering the first paragraph of said amended bill, this defendant states that it is without knowledge whether Elmer S. Bailey, referred to therein, is a citizen of Oklahoma, or whether plaintiff is a citizen of Oklahoma or of any other State, and is therefore without knowledge whether this suit presents a controversy wholly between citizen' of different States, and is without knowledge
46 whether said Elmer S. Bailey has any authority or right to sue as prochein ami of plaintiff, and therefore holds plaintiff to strict proof of all thereof; but admits that each of the defendants is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having its principal business office in, and being an inhabitant of, the Southern District of New York.

2. Answering the second paragraph of said amended bill, this defendant states that it is with' knowledge of the age of said Jackson Barnett; it admits that he is and was at all the times mentioned in said amended bill uneducated and unable to read or writ', but it denies that said Jackson Barnett now is or at any of the times mentioned in said amended bill was an imbecile, ignorant, or incapable of understanding or comprehending the value, condition, character, nature, or extent of his estate or any part thereof, or incapable of caring for himself or managing his property or incapable of discerning or appreciating the motives or designs of any person or persons with whom he came in contact, or incapable of comprehending or understanding any of the written instruments, trusts, requests, or agreements mentioned in said amended bill.

3. Answering the third paragraph of said amended bill, this defendant admits that said Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians, enrolled opposite number 4254 of the approved Creek roll, and as such was entitled to an allotment of land in the Indian Territory, and that there was allotted to him the property described in said paragraph third of the
47 amended bill; but this defendant states that it is without knowledge as to whether said Jackson Barnett failed to make any selection of allotment, or, if so, the reasons for said failure, or whether said premises were arbitrarily allotted to him.

4. This defendant states that it is advised that it is not called upon to make answer to paragraph fourth of said amended bill, the same containing mere conclusions of law.

5. Answering the fifth paragraph of said amended bill, this defendant states that it is without knowledge whether plaintiff was duly adjudged to be mentally incompetent by the County Court of Okmulgee County, Oklahoma, on or about April 29th, 1912, or at any of the times mentioned in said amended bill, or whether said court then, or at any of the times mentioned in said amended bill, had jurisdiction of either plaintiff's person or estate, or whether said county was at that time the place of residence of plaintiff, or whether said proceedings mentioned in said paragraph were had pursuant to the acts of Congress or the laws of the State of Oklahoma referred to in paragraph fourth of said amended bill, or whether on or about April 29th, 1912, or at any of the times mentioned in said amended bill, a guardian of the person or estate of plaintiff was appointed by the said County Court of Okmulgee County, or whether the guardian, if any, so appointed thereupon duly qualified or acted as such until the 13th June, 1923, or on said date or at any other time, resigned, or whether Elmer S. Bailey was thereupon appointed as the successor of said guardian, or
48 whether said Elmer S. Bailey duly qualified as such guardian or assumed the duties thereof, or whether then or at any time since he has acted or is now acting in such capacity, and therefore holds plaintiff to strict proof of all thereof.

6. Answering the sixth paragraph of said amended bill, this defendant states that it is without knowledge whether at all times prior to October 19th, 1922, the Secretary of the Interior of the United States had construed the acts of Congress as conferring jurisdiction of the estate of minor and incompetent Indians upon the County Courts of Oklahoma, or had recognized the jurisdiction of such courts by the rules and regulations of his department set forth in said paragraph of the amended bill.

7. Answering paragraph seventh of said amended bill, this defendant states that it is without knowledge whether at all times prior to the transactions complained of in said amended bill or at any other time plaintiff was recognized as a mental incompetent and Carl J. O'Hornett as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent

of the Five Civilized Tribes, and by all other officers and branches of the Department of the Interior with whom plaintiff came in contact, or as to what, if any, sums of money held for plaintiff were paid by the Department of the Interior to said Carl J. O'Hornett for the use or benefit of plaintiff upon orders of the County Court of said Okmulgee County, or whether any part of plaintiff's funds
49 held by the Department of the Interior were paid out by the latter other than to or through said O'Hornett upon order of said county court.

8. Answering the eighth paragraph of said amended bill. this defendant admits that on or about August 22nd, 1912, Carl J. O'Hornett, purporting to act as guardian for plaintiff, joined in a certain lease contract by plaintiff to H. U. Bartlett whereby there was leased to said Bartlett the premises described in said bill for a period of ten years from the date of the approval thereof by the Secretary of the Interior and as much longer thereafter as oil or gas should be found in paying quantities, and that a copy of said lease marked " Exhibit A" is attached to said amended bill; but this defendant states that it is without knowledge whether said O'Hornett had theretofore been duly appointed as guardian of plaintiff or whether said O'Hornett was then acting as such guardian.

9. Answering the ninth and tenth paragraphs of said amended bill, this defendant admits the allegations therein contained.

10. Answering the eleventh paragraph of said amended bill, this defendant denies that in January, 1920, or at any other time mentioned in said amended bill, plaintiff was incompetent; and it admits each and every other allegation of said amended bill contained in said paragraph.

11. Answering the twelfth paragraph of said amended bill, this defendant admits that prior to January, 1920, a number of articles had been published in various newspapers throughout the United States concerning plaintiff and his wealth, but this defendant
50 states that it is without knowledge as to whether plaintiff had become reputed to be the richest Indian in the world.

12. Answering the thirteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

13. Answering the fourteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, or an imbecile, or incapable of understanding the nature of a marriage contract or incapable of entering into a valid marriage; and defendant states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

14. Answering the fifteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent; and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

15. Answering the sixteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

16. Answering the seventeenth paragraph of said amended
51 bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

17. Answering the eighteenth paragraph of said amended bill, this defendant admits that prior to December 15th, 1922, there had accumulated in the hands of the Superintendent for the Five Civilized Tribes, for the use and benefit of plaintiff, from royalties from oil and gas from his allotment as aforesaid, a sum in excess of $1,100,000, which funds had been transferred by said superintendent to the Secretary of the Interior and invested by the latter in United States Liberty loan bonds or had been invested in said bonds by the said superintendent and said bonds forwarded to the Secretary of the Interior; but this defendant denies that either the said accumulation of said moneys, or the said investment thereof, or the said transfer of said bonds was without authority of law.

18. Answering the nineteenth paragraph of said amended bill, this defendant admits the allegations therein contained.

19. Answering the twentieth paragraph of said amended bill, this defendant states that it is without knowledge as to whether at some time prior to December, 1922, or at any other time, Anna Laura Barnett, Harold C. McGougin, A. J. Ward, or any other persons entered into a conspiracy for the purpose of extracting from plaintiff's estate a large sum of money, or whether for the pur-
52 pose of carrying out said alleged conspiracy said McGougin and Ward went to Washington, D. C., in October or November, 1922, or whether they there negotiated with the Commissioner of Indian Affairs, Charles H. Burke, or the then Secretary of the Interior, Albert B. Fall, or one of the latter's assistants, or whether arrangements were made between said McGougin, Ward, the Commissioner of Indian Affairs, and an Assistant Secretary of the Interior whereby United States Liberty loan bonds of the par value of $550,000 then held by the Secretary of the Interior for plaintiff should be delivered to Anna Laura Barnett and whereby other United States Liberty loan bonds of plaintiff of the par value of $550,000 should be delivered to this defendant under the trust agreement, of which a copy is hereto annexed, marked "Exhibit A," or whether said Anna Laura Barnett was requested to take plaintiff to Washington, D. C., for the purpose of carrying out said disbursement of the funds of plaintiff, or whether said Anna Laura Barnett took plaintiff to Washington, D. C., or whether she induced plaintiff to place his thumb mark on the communication addressed to the Secretary of the Interior through the Commissioner of Indian Affairs, a copy of which is attached to said amended bill marked "Exhibit

B." This defendant admits that said communication was prepared by A. J. Ward, but states that it is without knowledge as to whether it was prepared for the purpose of carrying out any previous alleged designs of said Anna Laura Barnett to acquire possession or control of plaintiff's estate, or as to whether the provisions for the trust fund in favor of this defendant was therein inserted for
53 the purpose of giving color of philanthropy to said transactions; but this defendant denies that plaintiff had no part in the negotiations for the said distribution of his estate, or that plaintiff had no knowledge of the proposed distribution, or that plaintiff had never heard of the defendant The American Baptist Home Mission Society, or that plaintiff had no desire or intention and was incapable of forming any desire or intention to distribute the estate in the manner set forth in said amended bill, or that plaintiff was incapable of understanding or comprehending the nature, extent, purpose, and effect of such distribution, or that said communication to the Secretary of the Interior was not read to or explained to plaintiff, or that plaintiff could not have understood or comprehended the meaning, nature, or extent of the same nor of the proposed distribution of his estate, or that said communication was not the act of plaintiff, or that it was the act and will of said Anna Laura Barnett and her other alleged co-conspirators or any of them. This defendant further denies that plaintiff's thumb mark was affixed to said instrument solely through the alleged domination of said Anna Laura Barnett; and this defendant states that it is without knowledge whether at the time plaintiff affixed his said thumb mark to said instrument said Anna Laura Barnett was present and surrounded by her counsel and alleged co-conspirators, or whether plaintiff did not have the benefit of counsel to represent and advise him, or as to whether the alleged negotiations for said distribution were pending for several months, or as to whether all knowledge of the same was kept from the person purport-
54 ing then to act as plaintiff's guardian or from the plaintiff's attorney, relatives, and friends in Oklahoma and from the County Court of Okmulgee County, Oklahoma, and from the United States probate attorney claiming to have jurisdiction in Okmulgee County, Oklahoma, and from the office of the Attorney General of the United States or from any of them.

20. Answering the twenty-first paragraph of said amended bill, this defendant admits the allegations therein contained.

21. Answering the twenty-second paragraph of said amended bill, this defendant admits that on or about February 1st, 1923, there were delivered to Anna Laura Barnett, the wife of plaintiff, United States Liberty loan bonds having a par value of $550,000, being part of the bonds held by the Secretary of the Interior for the use and benefit of plaintiff, and that the same were so delivered pursuant to an instrument of gift, of which a copy marked "Exhibit B" is annexed to said amended bill, and that said bonds to the extent of the par value of $200,000 were delivered by said Anna Laura Bar-

sent to the Riggs National Bank of Washington, D. C., under a certain trust agreement between her and said bank; and this defendant states that it is without knowledge as to what was done by said Anna Laura Barnett with the balance of said bonds.

22. Answering the twenty-third paragraph of said amended bill, this defendant admits that on or about February 1st, 1923, there were delivered to the defendant, The American Baptist Home Mission Society, United States Liberty loan bonds having a par value of $550,000, being part of the bonds held by the Secretary of the Interior for the use and benefit of plaintiff, to be by that defendant delivered to this defendant under a trust agreement to be approved by the Secretary of the Interior, and thereafter the defendant, The American Baptist Home Mission Society, duly delivered said bonds to this defendant under a trust agreement approved by the Secretary of the Interior, a copy of which is annexed hereto and marked "Exhibit A," and that said bonds have been at all times since then and now are held by this defendant under the provisions of said trust agreement, and that said bonds were so delivered pursuant to said instrument of gift, of which a copy, marked "Exhibit B," is annexed to said amended bill.

23. This defendant states that it is advised that it is not called upon to make answer to paragraphs twenty-fourth, twenty-fifth, and twenty-sixth of said amended bill, the same containing mere conclusions of law.

24. Answering the twenty-seventh paragraph of said amended bill, this defendant denies that the approval of the Secretary of the Interior of the distribution of said funds or property of plaintiff was procured by any misrepresentation of facts made in said instrument of gift, of which a copy, marked "Exhibit B," is annexed to said amended bill; and it also denies that said instrument was written at the instance of Anna Laura Barnett or by her employees or co-conspirators; and this defendant further denies that the statements contained in said instrument that plaintiff had no living relatives or kindred who, either by ties or blood or by their conduct towards plaintiff were entitled to any part of his estate or to any consideration from him whatsoever, or that no living relative prior to the time plaintiff became wealthy manifested any interest in him, or that said Anna Laura Barnett was a faithful and loving wife, or that she had shown plaintiff every consideration, or any of such statements was false or fraudulently made; and this defendant states that it is without knowledge as to whether at the time said instrument was executed plaintiff had and still has living a half-brother, one David Barnett, or whether said David Barnett prior to the time when plaintiff became wealthy lived with plaintiff or cared for or provided for him until plaintiff was able to purchase a home of his own and to provide servants for his care, or as to whether Anna Laura Barnett has since her marriage to plaintiff kept him in virtual captivity or has refused to permit him to see or communicate with the person claiming to be his guardian, his

friends, relatives, or members of his tribe, or any of them, or as to whether the affection or pretended affection bestowed upon plaintiff by said Anna Laura Barnett was for the sole purpose of extracting a large sum of money from his estate.

25. Answering the twenty-eighth paragraph of said amended bill, this defendant states that it is without knowledge as to whether M. L. Mott was a friend of Commissioner Charles H. Burke or whether said M. L. Mott was employed on behalf of Anna Laura Barnett in connection with the securing by her of said Liberty bonds, or if
57 he was so employed, the reasons therefor, or whether through his participation and influence, if any, said Commissioner of Indian Affairs was induced to accept as true and correct the statements set forth in said instrument of gift, and recommend the same for approval; and this defendant denies that the said statements or any of them were false.

26. Answering the twenty-ninth paragraph of said amended bill, this defendant admits that after the marriage of Anna Laura Barnett to plaintiff an investigation of the former's past life was caused to be made by the Department of the Interior by Secret Service agents, and that such agents made a detailed report to the Deparment of the Interior, but this defendant states that it is without knowledge as to the contents of said report; and this defendant denies that the Commissioner of Indian Affairs in recommending for approval the distribution of the said $1,100,000 Liberty loan bonds forming a part of plaintiff's estate abused his discretion, and it also denies that the approval of the Secretary of the Interior to said distribution was procured either by fraud, imposition, dec'it, or misrepresentation.

27. Answering the thirtieth paragraph of said amended bill, this defendant states that it is without knowledge as to whether the Commissioner of Indian Affairs or the Secretary of the Interior have, since said distribution of said bonds, been fully advised of all the alleged circumstances surrounding the same, or as to whether the Commissioner of Indian Affairs or the Secretary of Interior are actively co-operating with and assisting said Anna
58 Laura Barnett to establish the validity of said distribution or to prevent the recovery thereof by plaintiff.

28. Answering the thirty-first paragraph of said amended bill, this defendant admits the allegations thereof.

29. Answering the thirty-second paragraph of said amended bill, this defendant admits that it has collected a large amount of interest from said bonds and that the same is still in the possession of said defendant, and that the exact amount thereof is unknown to plaintiff or to any person purporting to act as plaintiff's guardian or next friend; but it denies that said interest or any part thereof has been unlawfully disposed of in violation of plaintiff's rights of which the defendants had due notice or otherwise, and states that all of said interest is still held by said defendant.

30. Answering the thirty-third paragraph of said amended bill, this defendant admits that it and defendant The American Baptist

Home Mission Society each knew at the times they respectively received said bonds that plaintiff was the owner thereof, subject to the qualifications, limitations, and restrictions imposed upon his said ownership thereof by law and the regulations prescribed by the Secretary of the Interior in respect to restricted property of restricted Indians; but it denies that either it or defendant The American Baptist Home Mission Society then knew that plaintiff was incompetent or that a guardian of the person or estate of plaintiff had
59 been appointed by the County Court of Okmulgee County, Oklahoma, and also denies that plaintiff was then mentally incompetent; and this defendant states that it is without knowledge whether a guardian of plaintiff's person or estate had been at that time or at any other time duly appointed by said court, or whether any person so appointed was still the duly appointed, qualified, and acting guardian of the person and estate of plaintiff.

31. Answering the thirty-fourth paragraph of said amended bill, this defendant admits that both it and defendant The American Baptist Home Mission Society have failed and refused to account for to plaintiff or to pay over to him said $550,000 par value of said bonds or the proceeds or interest or income thereof; but it denies that any such accounting or payment has been demanded.

32. Answering the thirty-fifth paragraph of said amended bill, this defendant denies the same.

And this defendant further says as a separate and distinct defense to the amended bill of complaint:

33. The plaintiff is a full-blood member of the Muskogee or Creek Tribe or Nation of Indians, which is one of the Five Civilized Tribes, and he is and at all times hereinafter mentioned was a so-called "restricted Indian," and as such was and is, under the Constitution and laws of the United States, both as to his person and property, under the special charge, control, and protection of the Secretary of the Interior of the United States; that prior to February 1, 1923, the plaintiff, as a member of the Creek or Muskogee Tribe or Na-
60 tion of Indians, was duly allotted and received as his distribution portion, or share of the lands of the Creek Nation certain property in Creek County, Oklahoma, described as the southeast quarter of section five (5), township seventeen (17), range 7 east; that under the laws of the United States said land was restricted land; and that thereafter said land was duly leased for oil and gas purposes and, pursuant to the terms and conditions of the agreement under which said land was leased, sums of money were from time to time duly paid to the Secretary of the Interior on account of royalties and bonuses payable under said lease, which said sums of money were restricted funds in the hands of the Secretary of the Interior; that thereafter out of said sums of money the Secretary of the Interior, pursuant to authority conferred upon him by the laws of the United States, duly purchased the $550,000 principal amount

of Liberty loan bonds referred to in said amended bill; that on or about February 1, 1923, the Secretary of the Interior, at the request and with the knowledge and consent of the plaintiff and pursuant to authority conferred upon him by the laws of the United States, duly delivered to the defendant The American Baptist Home Mission Society the $550,000 principal amount of Liberty loan bonds referred to in said amended bill, to be by it delivered to this defendant under a trust agreement to be approved by the Secretary of the Interior, and thereafter the defendant The American Baptist Home Mission Society duly delivered said bonds to this defendant under a trust agreement approved by the Secretary of the Interior, a copy of which is annexed hereto and marked "Exhibit A," and that they have been and at all times since then and now are held by this defend-
61 ant under the provisions of said trust agreement; that by the execution of said trust agreement and the delivery of said bonds as aforesaid, a valid trust was created upon the terms and conditions set forth in said trust agreement and the same is now in all respects a valid trust and this defendant holds said $550,000 principal amount of Liberty loan bonds for the uses and purposes set forth in said trust agreement. That the Secretary of the Interior as a further condition of said transaction in respect to said bonds required the defendant The American Baptist Home Mission Society to execute and deliver to him a certain declaration of trust, of which a copy is hereto annexed and marked "Exhibit B." That neither the plaintiff nor any person claiming by, through, or under him, or representing him as guardian or committee or otherwise, has any right to question or attack in any way the validity of said trust created by the execution of said trust agreement and the delivery of said bonds to this defendant as aforesaid, or the validity or conclusiveness of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior as aforesaid, is subject to review by this or any other court.

Wherefore this defendant prays that said amended bill be dismissed and for judgment for its costs in this behalf incurred.

MURRAY, ALDRICH & ROBERTS,
Solicitors for the Defendant
The Equitable Trust Company of New York,
37 Wall Street, New York, N. Y.

62 *Exhibit A to answer of Equitable Trust Co.*

Agreement made this 1st day of February, in the year nineteen hundred and twenty-three, between The American Baptist Home Mission Society, incorporated by a special act of the Legislature of the State of New York, party of the first part, and the Equitable

Trust Company of the city of New York, party of the second part, witnesseth:

First. That in consideration of the covenants and agreements on the part of the party of the second part, hereinafter set forth, the party of the first part deposits with the party of the second part Liberty loan bonds of the United States to the amount of five hundred and fifty thousand dollars ($550,000), the receipt whereof by the party of the second part is hereby acknowledged, in trust, nevertheless, for the uses and purposes hereinafter set forth.

Second. That the party of the second part receives the said bonds under the agreement and it hereby agrees that it will take and hold said bonds and the proceeds thereof and that it will collect and receive the income thereon and therefrom, and will pay the net annual income therefrom during the life of Jackson Barnett, of Coffeyville, Montgomery County, Kansas, in quarterly instalments on the first day of April, July, October, and January, as nearly equal as may be, as follows:

(a) So long as said Jackson Barnett shall be a restricted Indian under the laws of the United States said net income in an amount not to exceed $20,000 in any one year, to the Superintendent for
63 the Five Civilized Tribes, or to his successor in office, at Muskogee, Muskogee County, Oklahoma. Every such payment shall be accompanied by a letter stating that the same is for the benefit of said Jackson Barnett; but it shall in no event be any part of the duty of the said party of the second part to see to the application thereof by said superintendent or his successor in office.

(b) Upon the removal of said restrictions from said Jackson Barnett and his property, said net income in an amount not to exceed $20,000 in any one year, to said Jackson Barnett by mailing to him personally drafts payable at his place of residence or as near thereto as banking facilities may permit, irrespective of whether any guardian or other custodian of the property of said Jackson Barnett shall have been appointed.

(c) The excess, if any, of said net income collected and received about $20,000 in any one year, to the party of the first part. (It is the intention of the party of the first part that said excess, if any, shall be used by it for the benefit of Indian University located at Bacone, Oklahoma, and known generally as Bacone College, and also for the benefit of Murrow Indian Orphans' Home located at said Bacone; but it shall in no event be any part of the duty of the said party of the second part to see to the application thereof by said party of the first part.)

Third. That the payments of said instalments pursuant to
64 the terms hereof to the Superintendent for the Five Civilized Tribes, or his successor in office, or the said Jackson Barnett, as the case may be, are to be made regardless of any appointment of any guardian or custodian of either the person or the property of said Jackson Barnett, it being the intention of this agreement that

the one who shall receive pursuant to the terms hereof the moneys payable under this agreement, whether the said superintendent or his successor in office or the said Barnett, shall have the sole right to receive, handle, and control said moneys without the interference or interposition of any other official or of any other person whatsoever.

Fourth. That said Jackson Barnett shall not have the power to assign the whole or any part of the income payable to the said superintendent or his successor in office or to said Barnett under this agreement, and that any such assignment shall be void and ineffective to transfer any such interest or right and shall be disregarded by the two parties to this agreement, and shall not have the effect to delay or suspend any payment to the said superintendent or his successor in office or the said Barnett, as hereinbefore provided.

Fifth. The party of the second part shall have the right to present for redemption as they mature or to sell the said Liberty bonds in its discretion and to invest and keep invested the proceeds thereof in securities authorized by law for the investment of trust funds by the law of the State of New York, and to pay over the income from such reinvestments in the same manner as hereinbefore provided in the case of the income from said bonds.

65 Sixth. This agreement shall cease and come to an end upon the death of said Jackson Barnett and thereupon the party of the second part shall deliver to the party of the first part the securities or the proceeds of any securities held by the party of the second part under this agreement and any income on said trust fund which may have accrued subsequent to the date of the death of said Jackson Barnett; and shall deliver to the executor or administrator of said Jackson Barnett as part of his estate any income from said trust fund which may have accrued prior to the death of said Jackson Barnett.

Seventh. It shall be the duty of the several persons to whom the trustee is directed to pay the net income or principal of said trust fund hereby created to notify the trustee of the happening of the event or events by reason of which they may respectively become entitled to receive any such payment and to furnish reasonable proof to the trustee of the happening of any such event or events, and any payment, whether of income or principal, made in good faith by the trustee in the absence of such notice and such satisfactory proof until received, or in reliance upon such notice and such satisfactory proof when received, shall be deemed to have been made in the lawful execution of the trusts hereby created. The receipts of the several persons to whom the trustee is directed to pay the net income or the principal of the trust fund hereby created shall be, as against all persons, an absolute discharge and acquittance of the trustee as to the amounts and property covered thereby.

Eighth. That the trustee, in addition to its lawful ex-

66 penses and disbursements, including counsel fees, shall receive as compensation for its services herein the fees and

commissions allowed for testamentary trustees under the laws of the State of New York, and it is hereby authorized to deduct said amounts, respectively, from the income and from the principal before paying over the same to any person or persons entitled thereto by the provisions of this indenture.

Ninth. This agreement shall not be binding or of any effect until the Secretary of the Interior of the United States or an Assistant Secretary of the Interior of the United States shall have endorsed his approval hereon.

In witness whereof each of the parties hereto have caused its corporate seal to be affixed and these presents to be signed by its duly authorized officer, on the day and year first above written.

[SEAL.] THE AMERICAN BAPTIST HOME MISSION SOCIETY,
By CHARLES L. WHITE, *Executive Secretary.*

As to the American Baptist Home Mission Society:
SAMUEL BRYANT.

[SEAL.] THE EQUITABLE TRUST COMPANY OF NEW YORK,
By J. N. BABCOCK, *Vice President.*

As to the Equitable Trust Company of New York. Attest:
A. D. SNYDER, *Secy.*

Executed in triplicate.

67 STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of February, in the year 1923, before me personally came Charles L. White, to me known, who, being duly sworn, did depose and say that he resides in New York City, N. Y., that he is the executive secretary of the American Baptist Home Mission Society, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to this instrument is such corporate seal; that it was so affixed by order of the board of managers of said corporation, and that he signed his name thereto by like order.

[SEAL.] MAUDE S. DEAN,
Notary Public, N. Y. County.

New York County Clk.'s No. 52.
New York Register's No. 4066.
Commission expires March 30, 1924.

68 STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of February, in the year 1923, before me personally came J. N. Babcock, to me known, who, being duly sworn, did depose and say that he resides in New York City, N. Y., that he is a vice president of the Equitable Trust Company of New York, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to

this instrument is such corporate seal; that it was so affixed by order of the board of trustees of said corporation, and that he signed his name thereto by like order.

[SEAL.]

A. H. BROWN,
Notary Public, New York County.

New York County Clk.'s No. 312.
New York Register's No. 4084.
Commission expires March 30th, 1924.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 5, 1923.

Approved.

F. M. GOODWIN,
Assistant Secretary of the Interior.

69 *Exhibit B to answer of Equitable Trust Co.*

This declaration made this 1st day of February, in the year nineteen hundred*ed* and twenty-three, by the American Baptist Home Mission Society, incorporated by a special act of the Legislature of the State of New York, hereinafter called the society; whereas:

First. It appears by a certain agreement in writing bearing even date herewith between the society and the Equitable Trust Company of New York, hereinafter called the trust company, that—

1. The society has received as the property of one Jackson Barnett, of Coffeyville, Montgomery County, Kansas, and with his consent and at his request has in consideration of the covenants and agreements hereinafter set forth on the part of the said trust company, deposited with said trust company Liberty loan bonds of the United States to the amount of five hundred and fifty thousand dollars ($550,000), in trust, nevertheless, for the uses and purposes hereinafter set forth.

2. The said trust company received the said bonds under the agreement that it would take and hold said bonds and the proceeds thereof and that it will collect the income from said bonds or proceeds, and will pay to said Jackson Barnett twenty thousand ($20,000) annually from said income, in equal quarterly instalments, payable on the first day of April, July, October, and January in each year, by drafts payable to the order of the Superintendent for the Five Civi-
70 lized Tribes at Muskogee County, Oklahoma, the said payments to the said superintendent to continue so long as the said Jackson Barnett shall live and shall be a restricted Indian under the laws of the United States, and that said trust company will pay said instalments to said Jackson Barnett personally so long as he shall live after the restrictions imposed upon him and his property by law shall be removed, and in that event will make the payments to him by drafts payable at his place of residence or as near thereto as banking facilities may permit.

3. The payments of said instalments to the Superintendent for the Five Civilized Tribes or to said Jackson Barnett, as the case may be and as hereinbefore provided, will be made regardless of any appointment of any guardian of either the person or the property of said Jackson Barnett, it being the intention of said agreement that the one who shall receive the moneys payable thereunder, whether the said superintendent or the said Barnett, shall have the sole right to receive, handle, and control said moneys without the interference or interposition of any official other than the said superintendent or any person other than the said Barnett.

4. The said Jackson Barnett shall not have the power to assign the whole or any part of the income payable to the said superintendent or to said Barnett under said agreement or to assign any interest or right under said agreement, and that any such assignment shall be void and ineffective to transfer any such interest or right and shall be disregarded by the two parties to said agreement, and shall not have the effect to delay or to suspend any payment
71 to the said superintendent or the said Barnett as therein provided.

5. The said trust company will pay any net income in excess of said sum of twenty thousand dollars ($20,000) received from said bonds or from the proceeds thereof or from any securities in which said proceeds may be invested, to the said society to be used by it for the benefit of Indian University located at Bacone, Oklahoma, and known generally as Bacone University, and also for the benefit of Murrow Indian Orphans' Home located at said Bacone.

6. The said trust company shall have the right to present for redemption as they mature or to sell the said Liberty loan bonds in its discretion and the proceeds thereof to invest and to keep invested and the income therefrom to pay as provided in the case of the income from said bonds.

7. The said agreement shall cease and come to an end upon the death of said Jackson Barnett, and thereupon the said trust company shall deliver to the said society the securities or the proceeds of any securities held by the trust company under said agreement and will also pay to said society any collected income therefrom.

8. For its services under said agreement the said trust company in addition to its lawful expenses and disbursements, including counsel fees, shall receive as compensation for its services the fees and commissions allowed to testamentary trustees under the laws of the State of New York.

72 9. Said agreement shall be subject to the approval of the Secretary of the Interior, to be evidenced by his signature.

Now, therefore, this declaration witnesseth:

First. That the said The American Baptist Home Mission Society hereby declares that the facts and that the terms of the agreement between it and the Equitable Trust Company of the city of New York hereinbefore set forth are in all respects correctly stated.

Second. That any income received during the lifetime of said Jackson Barnett by the society from said trust company under the terms of said agreement will be received by the society in trust and will be used by it for the benefit of Indian University located at Bacone, Oklahoma, and known generally as Bacone University, and also for the benefit of Murrow Indian Orphans' Home located at said Bacone.

Third. That any securities or the proceeds of any securities or the proceeds of said securities so received, or any income received by said society from said trust company under the terms of said agreement will be received by the society in trust, and that said securities and the proceeds of any securities will be held in trust by it and that said proceeds will be invested and will be kept invested, and that the net income therefrom and any income received by said society from said trust company will be used by the society
73 for the benefit of said Indian University and said Murrow Indian Orphans' Home.

In witness whereof the said society has hereunto caused its corporate seal to be affixed and these presents to be signed by its executive secretary and its treasurer on the day and year first above written.

In the presence of:

THE AMERICAN BAPTIST HOME MISSION SOCIETY,
By CHARLES L. WHITE, *Executive Secretary*,
SAMUEL BRYANT, *Treasurer*.

74 STATE OF NEW YORK,
County of New York, ss:

On this 2nd day of February, 1923, before me personally came Charles L. White and Samuel Bryant, to me known, and who being by me severally duly sworn, did depose and say that said Charles L. White resides in the city of New York; and that said Samuel Bryant resides in Palisades Park, New Jersey; that said Charles L. White is the executive secretary and that said Samuel Bryant is the treasurer of The American Baptist Home Mission Society, the corporation described in and which executed the foregoing instrument; that they knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of managers of said corporation, and that they signed their names thereto by like order.

MAUDE S. DEAN,
Notary Public, New York County.

New York County Clk.'s No. 32.
New York Register's No. 4065.
Commission expires March 30th, 1924.

75 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Answer of the American Baptist Home Mission Society

The answer of the defendant The American Baptist Home Mission Society to the amended bill of complaint filed herein respectfully shows to the court as follows:

1. Answering the first paragraph of said amended bill, this defendant states that it is without knowledge whether Elmer S. Bailey, referred to therein, is a citizen of Oklahoma, or whether plaintiff is a citizen of Oklahoma or of any other State, and is therefore without knowledge whether this suit presents a controversy wholly between citizens of different States, and is without knowledge whether said Elmer S. Bailey has any authority or right to sue as prochein ami of plaintiff, and therefore holds plaintiff to strict proof of all thereof; but admits that each of the defendants
76 is a corporation organized and existing under the laws of the State of New York and a citizen of said State, having its principal business office in, and being an inhabitant of, the Southern District of New York.

2. Answering the second paragraph of said amended bill, this defendant states that it is without knowledge of the age of said Jackson Barnett; it admits that he is and was at all the times mentioned in said amended bill uneducated and unable to read or write, but it denies that said Jackson Barnett now is or at any of the times mentioned in said amended bill was an imbecile, ignorant or incapable of understanding or comprehending the value, condition, character, nature or extent of his estate or any part thereof, or incapable of caring for himself or managing his property or incapable of discerning or appreciating the motives or designs of any person or persons with whom he came in contact, or incapable of comprehending or understanding any of the written instruments, trusts, requests, or agreements mentioned in said amended bill.

3. Answering the third paragraph of said amended bill, this defendant admits that said Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians, enrolled opposed number 4254 of the Approved Creek Roll, and as such was entitled to an allotment of land in the Indian Territory, and that there was allotted to him the property described in said paragraph third of
77 the amended bill; but this defendant states that it is without knowledge as to whether said Jackson Barnett failed to make any selection of allotment, or, if so, the reasons for said failure, or whether said premises were arbitrarily allotted to him.

4. This defendant states that it is advised that it is not called upon to make answer to paragraph fourth of said amended bill, the same containing mere conclusions of law.

5. Answering the fifth paragraph of said amended bill, this defendant states that it is without knowledge whether plaintiff was

duly adjudged to be mentally incompetent by the County Court of Okmulgee County, Oklahoma, on or about April 29th, 1912, or at any of the times mentioned in said amended bill, or whether said court then, or at any of the times mentioned in said amended bill, had jurisdiction of either plaintiff's person or estate, or whether said county was at that time the place of residence of plaintiff, or whether said proceedings mentioned in said paragraph were had pursuant to the acts of Congress or the laws of the State of Oklahoma referred to in paragraph fourth of said amended bill, or whether on or about April 29th, 1912, or at any of the times mentioned in said amended bill, a guardian of the person or estate of plaintiff was appointed by the said County Court of Okmulgee County, or whether the guardian, if any, so appointed thereupon duly qualified or acted as such until the 13th June, 1923, or, on said date or at any other time, resigned, or whether Elmer S. Bailey was thereupon
78 appointed as the successor of said guardian, or whether said Elmer S. Bailey duly qualified as such guardian or assumed the duties thereof, or whether then or at any time since he has acted or is now acting in such capacity, and therefore holds himself to strict proof of all thereof.

6. Answering the sixth paragraph of said amended bill, this defendant states that it is without knowledge whether at all times prior to October 19th, 1922, the Secretary of the Interior of the United States had construed the acts of Congress as conferring jurisdiction of the estates of minor and incompetent Indians upon the County Courts of Oklahoma, or had recognized the jurisdiction of such courts by the rules and regulations of his department set forth in said paragraph of the amended bill.

7. Answering paragraph seventh of said amended bill, this defendant states that it is without knowledge whether at all times prior to the transactions complained of in said amended bill or at any other time plaintiff was recognized as a mental incompetent and Carl J. O'Hornett as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent of the Five Civilized Tribes and by all other officers and branches of the Department of the Interior with whom plaintiff came in contact, or as to what, if any, sums of money held for plaintiff were paid by the Department of the Interior to said Carl J. O'Hornett for the use or benefit of plaintiff upon orders of the County Court of said
79 Okmulgee County, or whether any part of plaintiff's funds held by the Department of the Interior were paid out by the latter other than to or through said O'Hornett, upon order of said County Court.

8. Answering the eighth paragraph of said amended bill, this defendant admits that on or about August 22nd, 1912, Carl J. O'Hornett, purporting to act as guardian for plaintiff, joined in a certain lease contract by plaintiff to H. U. Bartlett whereby there was leased to said Bartlett the premises described in said bill, for a period of ten years from the date of the approval thereof by the

Secretary of the Interior and as much longer thereafter as oil or gas should be found in paying quantities, and that a copy of said lease marked "Exhibit A" is attached to said amended bill; but this defendant states that it is without knowledge whether said O'Hornett had theretofore been duly appointed as guardian of plaintiff or whether said O'Hornett was then acting as such guardian.

9. Answering the ninth and tenth paragraphs of said amended bill, this defendant admits the allegations therein contained.

10. Answering the eleventh paragraph of said amended bill, this defendant denies that in January, 1920, or at any other time mentioned in said amended bill, plaintiff was incompetent; and it admits each and every other allegation of said amended bill contained in said paragraph.

11. Answering the twelfth paragraph of said amended bill,
60 this defendant admits that prior to January, 1920, a number of articles had been published in various newspapers throughout the United States concerning plaintiff and his wealth, but this defendant states that it is without knowledge as to whether plaintiff had become reputed to be the richest Indian in the world.

12. Answering the thirteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

13. Answering the fourteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, or an imbecile, or incapable of understanding the nature of a marriage contract or incapable of entering into a valid marriage; and defendant states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

14. Answering the fifteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent; and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

15. Answering the sixteenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in
61 respect to all of the other matters set forth in said paragraph.

16. Answering the seventeenth paragraph of said amended bill, this defendant denies that at any time therein mentioned plaintiff was incompetent, and it states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

17. Answering the eighteenth paragraph of said amended bill, this defendant admits that prior to December 15th, 1922, there had accumulated in the hands of the Superintendent for the Five Civilized Tribes, for the use and benefit of plaintiff, from royalties from oil and gas from his allotment as aforesaid, a sum in excess of $1,100,000, which funds had been transferred by said superintendent to the Secretary of the Interior and invested by the latter in United

States Liberty loan bonds or had been invested in said bonds by the said superintendent and said bonds forwarded to the Secretary of the Interior; but this defendant denies that either the said accumulation of said moneys, or the said investment thereof, or the said transfer of said bonds with without authority of law.

18. Answering the nineteenth paragraph of said amended bill, this defendant admits the allegations therein contained.

19. Answering the twentieth paragraph of said amended bill, this defendant states that it is without knowledge as to whether at
82 some time prior to December, 1922, or at any other time, Anna Laura Barnett, Harold C. McGougin, A. J. Ward, or any other persons entered into a conspiracy for the purpose of extracting from plaintiff's estate a large sum of money or whether for the purpose of carrying out said alleged conspiracy said McGougin and Ward went to Washington, D. C., in October or November, 1922, or whether they there negotiated with the Commissioner of Indian Affairs, Charles H. Burke, or the then Secretary of the Interior, Albert B. Fall, or one of the latter's assistants, or whether arrangements were made between said McGougin, Ward, the Commissioner of Indian Affairs, and an Assistant Secretary of the Interior whereby United States Liberty loan bonds of the par value of $550,000 then held by the Secretary of the Interior for plaintiff should be delivered to Anna Laura Barnett and whereby other United States Liberty loan bonds of plaintiff of the par value of $550,000 should be delivered to this defendant under the trust agreement of which a copy is hereto annexed, marked "Exhibit A," or whether said Anna Laura Barnett was requested to take plaintiff to Washington, D. C., for the purpose of carrying out said disbursement of the funds of plaintiff, or whether said Anna Laura Barnett took plaintiff to Washington, D. C., or whether she induced plaintiff to place his thumb mark on the communication addressed to the Secretary of the Interior through the Commissioner of Indian Affairs, a copy of which is attached to said amended bill marked "Exhibit B." This defendant admits that said communication was prepared by
A. J. Ward, but states that it is without knowledge as to
83 whether it was prepared for the purpose of carrying out any previous alleged designs of said Anna Laura Barnett to acquire possession or control of plaintiffs' estate, or as to whether the provision for the trust fund in favor of this defendant was therein inserted for the purpose of giving a color of philanthropy to said transactions; but this defendant denies that plaintiff had no part in the negotiations for the said distribution of his estate, or that plaintiff had no knowledge of the proposed distribution, or that plaintiff had never heard of this defendant, or that plaintiff had no desire or intention and was incapable of forming any desire to distribute the estate in the manner set forth in said amended bill, or that plaintiff was incapable of understanding or comprehending the nature, extent, purpose and effect of such distribution, or that said communication to the Secretary of the Interior was not read to or explained to

plaintiff, or that plaintiff could not have understood or comprehended the meaning, nature or extent of the same nor of the proposed distribution of his estate, or that said communication was not the act of plaintiff, or that it was the act and will of said Anna Laura Barnett and her other alleged co-conspirators or any of them. This defendant further denies that plaintiff's thumb mark was affixed to said instrument solely through the alleged domination of said Anna Laura Barnett; and this defendant states that it is without knowledge whether at the time plaintiff affixed his said thumb mark to said instrument said Anna Laura Barnett was present and surrounded by her counsel and alleged co-conspirators, or whether
84 plaintiff did not have the benefit of counsel to represent and advise him, or as to whether the alleged negotiations for said distribution were pending for several months, or as to whether all knowledge of the same was kept from the person purporting then to act as plaintiff's guardian or from the plaintiff's attorney, relatives and friends in Oklahoma and from the County Court of Okmulgee County, Oklahoma, and from the United States probate attorney claiming to have jurisdiction in Okmulgee County, Oklahoma, and from the office of the Attorney General of the United States, or from any of them.

20. Answering the twenty-fifth paragraph of said amended bill, this defendant admits the allegations therein contained.

21. Answering the twenty-second paragraph of said amended bill, this defendant admits that on or about February 1st, 1923, there were delivered to Anna Laura Barnett, the wife of plaintiff, United States Liberty bonds having a par value of $550,000 being part of the bonds held by the S'cretary of the Interior for the use and benefit of plaintiff, and that the same were so delivered pursuant to an instrument of gift, of which a copy marked "Exhibit B" is annexed to said amended bill, and that said bonds to the extent of the par value of $200,000 were delivered by said Anna Laura Barnett to the Riggs National Bank, of Washington, D. C., under a certain trust agreement between her and said bank; and this defendant states that it is without knowledge as to what was done by said Anna Laura Barnett with the balance of said bonds.

85 22. Answering the twenty-third paragraph of said amended bill, this defendant admits that on or about February 1st, 1923, there were delivered to the defendant The American Baptist Home Mission Society United States Liberty loan bonds having a par value of $550,000, being part of the bonds held by the Secretary of the Interior for the use and benefit of plaintiff, to be by that defendant delivered to this defendant under a trust agreement to be approved by the Secretary of the Interior, and thereafter the defendant The American Baptist Home Mission Society duly delivered said bonds to this defendant under a trust agreement approved by the Secretary of the Interior, a copy of which is annexed hereto and marked "Exhibit A," and that said bonds have been at all times since then and now are held by defendant The Equitable Trust

Company of New York under the provisions of said trust agreement, and that said bonds were so delivered pursuant to said instrument of gift of which a copy marked "Exhibit B" is annexed to said amended bill.

23. This defendant states that it is advised that it is not called upon to make answer to paragraphs Twenty-fourth, Twenty-fifth, and Twenty-sixth of said amended bill, the same containing mere conclusions of law.

24. Answering the twenty-seventh paragraph of said amended bill, this defendant denies that the approval of the Secretary of the Interior of the distribution of said funds or property of plaintiff
86 was procured by any misrepresentation of facts made in said instrument of gift of which a copy, marked "Exhibit B," is annexed to said amended bill; and it also denies that said instrument was written at the instance of Anna Laura Barnett or by her employees or co-conspirators; and this defendant further denies that the statements contained in said instrument that plaitiff had no living relatives or kindred who, either by ties of blood or by their conduct towards plaintiff were entitled to any part of his estate or to any consideration from him whatsoever, or that no living relative prior to the time plaintiff became wealthy manifested any interest in him, or that said Anna Laura Barnett was a faithful and loving wife, or that she had shown plaintiff every consideration, or any of such statements was false or fraudulently made; and this defendant states that it is without knowledge as to whether at the time said instrument was executed plaintiff had and still has living a half-brother, one David Barnett, or whether said David Barnett prior to the time when plaintiff became wealthy lived with plaintiff or cared for or provided for him until plaintiff was able to purchase a home of his own and to provide servants for his care, or as to whether Anna Laura Barnett has since her marriage to plaintiff kept him in virtual captivity or has refused to permit him to see or communicate with the person claiming to be his guardian, his friends, relatives, or members of his tribe, or any of them, or as to whether the affection or pretended affection bestowed upon plaintiff by said Anna Laura Barnett was for the sole purpose of extracting a large sum of money from his estate.

87 25. Answering the twenty-eighth paragraph of said amended bill, this defendant states that it is without knowledge as to whether M. L. Mott was a friend of Commissioner Charles H. Burke or whether said M. L. Mott was employed on behalf of Anna Laura Barnett in connection with the securing by her of said Liberty bonds or if he was so employed, the reasons therefor, or whether through his participation and influence, if any, said Commissioner of Indian Affairs was induced to accept as true and correct the statements set forth in said instrument of gift, and recommend the same for approval; and this defendant denies that the said statements or any of them were false

26. Answering the twenty-ninth paragraph of said amended bill, this defendant admits that after the marriage of Anna Laura Barnett to plaintiff an investigation of the former's past life was caused to be made by the Department of the Interior by Secret Service agents, and that such agents made a detailed report to the Department of the Interior; but this defendant states that it is without knowledge as to the contents of said report; and this defendant denies that the Commissioner of Indian Affairs in recommending for approval the distribution of the said $1,100,000 Liberty loan bonds forming a part of plaintiff's estate abused his discretion, and its also denies that the approval of the Secretary of the Interior to said distribution was procured either by fraud, imposition, deceit, or misrepresentation.

27. Answering the thirtieth paragraph of said amended bill,
88 this defendant states that it is without knowledge as to whether the Commissioner of Indian Affairs or the Secretary of the Interior have, since said distribution of said bonds, been fully advised of all the alleged circumstances surrounding the same, or as to whether the Commissioner of Indian Affairs or the Secretary of the Interior are actively co-operating with and assisting said Anna Laura Barnett to establish the validity of said distribution to to prevent the recovery thereof by plaintiff.

28. Answering the thirty-first paragraph of said amended bill, this defendant admits the allegations thereof.

29. Answering the thirty-second paragraph of said amended bill, this defendant admits that defendant The Equitable Trust Company of New York has collected a large amount of interest from said bonds and that the same is still in the possession of said defendant, and that the exact amount thereof is unknown to plaintiff or to any person purporting to act as plaintiff's guardian or next friend; but it denies that said interest or any part thereof has been unlawfully disposed of in violation of plaintiff's rights of which the defendants had due notice or otherwise, and states that all of said interest is still held by said defendant.

30. Answering the thirty-third paragraph of said amended bill, this defendant admits that it and defendant The Equitable Trust Company of New York each knew at the times they respectively received said bonds that plaintiff was the owner thereof subject to
89 the qualifications, limitations, and restrictions imposed upon his said ownership thereof by law and the regulations prescribed by the Secretary of the Interior in respect to restricted property of restricted Indians; but it denies that either it or defendant The Equitable Trust Company of New York then knew that plaintiff was incompetent or that a guardian of the person or estate of plaintiff had been appointed by the county court of Okmulgee County, Oklahoma, and also denies that plaintiff was then mentally incompetent; and this defendant states that it is without knowledge whether a guardian of plaintiff's person or estate had been at that

time or at any other time duly appointed by said court, or whether any person so appointed was still the duly appointed, qualified, and acting guardian of the person and estate of plaintiff.

31. Answering the thirty-fourth paragraph of said amended bill, this defendant admits that both it and defendant The Equitable Trust Company of New York have failed and refused to account for to plaintiff or to pay over to him said $550,000 par value of said bonds or the proceeds or interest or income thereof; but it denies that any such accounting or payment has been demanded.

32. Answering the thirty-fifth paragraph of said amended bill, this defendant denies the same.

And this defendant further says as a separate and distinct defense to the amended bill of complaint:

33. The plaintiff is a full-blood member of the Muskogee or Creek Tribe or Nation of Indians, which is one of the Five
90 Civilized Tribes, and he is and at all times hereinafter mentioned was a so-called "restricted Indian," and as such was and is under the Constitution and laws of the United States, both as to his person and property, under the special charge, control, and protection of the Secretary of the Interior of the United States; that prior to February 1, 1923, the plaintiff, as a member of the Creek or Muskogee Tribe or Nation of Indians, was duly allotted and received as his distribution, portion, or share of the lands of the Creek Nation certain property in Creek County, Oklahoma, described as the southeast quarter of section five (5), township seventeen (17), range 7 east; that under the laws of the United States said land was restricted land; and that thereafter said land was duly leased for oil and gas purposes and, pursuant to the terms and conditions of the agreement under which said land was leased, sums of money were from time to time duly paid to the Secretary of the Interior on account of royalties and bonuses, payable under said lease, which said sums of money were restricted funds in the hands of the Secretary of the Interior; that thereafter out of said sums of money the Secretary of the Interior, pursuant to authority conferred upon him by the laws of the United States, duly purchased the $550,000 principal amount of Liberty loan bonds referred to in said amended bill; that on or about February 1, 1923, the Secretary of the Interior, at the request and with the knowledge and consent of the plaintiff and pursuant to authority conferred upon him by the laws of the United States, duly delivered to this defendant the $550,000 prin-
cipal amount of Liberty loan bonds referred to in said
91 amended bill, to be by it delivered to defendant The Equitable Trust Company of New York under a trust agreement to be approved by the Secretary of the Interior, and thereafter this defendant duly delivered said bonds to the defendant The Equitable Trust Company of New York under a trust agreement approved by the Secretary of the Interior, a copy of which is

annexed hereto and marked "Exhibit A," and that they have been and at all times since then and now are held by The Equitable Trust Company of New York under the provisions of said trust agreement; that by the execution of said trust agreement and the delivery of said bonds as aforesaid, a valid trust was created upon the terms and conditions set forth in said trust agreement and the same is now in all respects a valid trust and the defendant The Equitable Trust Company of New York holds said $550,000 principal amount of Liberty loan bonds for the uses and purposes set forth in said trust agreement. That the Secretary of the Interior as a further condition of said transaction in respect to said bonds required this defendant to execute and deliver to him a certain declaration of trust of which a copy is hereto annexed and marked "Exhibit B." That neither the plaintiff nor any person claiming by, through, or under him, or representing him as guardian or committee or otherwise, has any right to question or attack in any way the validity of said trust created by the execution of said trust agreement and the delivery of said bonds to the defendant The Equitable Trust Company of New York as aforesaid, or the validity or conclusiveness of the acts of the Secretary of the Interior
92 in connection therewith, and that none of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior as aforesaid, is subject to review by this or any other court.

Wherefore this defendant prays that said amended bill be dismissed and for judgment for its costs in this behalf incurred.

THE AMERICAN BAPTIST HOME MISSION SOCIETY,
By CHAS. S. FETTRETCH, *General Counsel.*

CHAS. S. FETTRETCH,
Attorney for the American
Baptist Home Mission Society.

Statement re exhibits to answer

Exhibit A: This is the same as Exhibit A attached to answer of The Equitable Trust Company of New York.

Exhibit B: This is the same as Exhibit B attached to answer of The Equitable Trust Company of New York.

93 In United States District Court

[Title omitted.]

Motion of United States for leave to intervene

Comes now the United States of America by Emory R. Buckner, United States attorney, and move the court for leave to intervene in the above-entitled caused and file an intervening petition, of which proposed intervening petition the attached is a copy.

United States of America, by B. M. Parmenter, Assistant Attorney General.

Nat M. Lacy, special assistant to the Attorney General.

Emory R. Buckner, United States attorney, Southern District of New York.

To the Attorneys for the Plaintiff and Defendants:

Please Take Notice that the foregoing motion will be called to the attention of the presiding judge of this court hearing motions
94 on Tuesday, January 5, 1926, at ten thirty o'clock a. m., on or soon thereafter as the same may be reached.

UNITED STATES OF AMERICA,
By B. M. PARMENTER,
Assistant Attorney General.
NAT M. LACY,
Special Assistant to the Attorney General.
EMORY R. BUCKNER,
United States Attorney, Southern District of New York.

95 In United States District Court

[Title omitted.]

Petition of intervention of the United States

Comes now the United States of America and, having first secured permission of court, files this its petition of intervention, and for cause of action alleges and states:

1. That Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians duly enrolled opposite roll No. 4264, and is a resident of the United States and domiciled in the State of Oklahoma. That as such citizen of the Creek nation there was allotted to him as his distributive share of the lands of the Creek Nation 160 acres of land in what is now Creek County, State of Oklahoma.

2. This intervenor alleges that Jackson Barnett is approximately of the age of seventy-five years; that at all times herein mentioned he was and is now a mental incompetent, ignorant, uneducated,
96 and unable to read or write and wholly incapable of understanding or comprehending the value, condition, character, nature, or extent of his estate, and incapable of caring for himself and managing his property, and incapable of discerning or aprpeciating the motives and designs of any person or persons with whom he came in contact, and incapable of comprehending or understanding any of the written instruments, purported trusts, requests, and agreements hereinafter mentioned.

3. That prior to April, 1912, the Congress of the United States had conferred upon the County Courts of the State of Oklahoma (which are the courts exercising probate jurisdiction) full and com-

plete jurisdiction of the guardianship of the persons and estates of minors and incompetents, whether Indians, freedmen, or otherwise. That on and prior to said date there were in force in the State of Oklahoma certain statutes of said State, now section 1449, 1450, 1451, and 4893 of the Compiled Statutes of Oklahoma, 1921, which provide as follows:

"1449. Petitions for guardians of incompetent or insane persons. When it is represented to the county court upon verified petition of any relative or friend that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

97 "1450. Guardian appointed when. If after a full hearing and examination upon such petition it appears to the judge of the County Court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article (chapter) specified.

"1451. Bond and powers of guardian. Every guardian appointed as provided in the preceding section has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions, as before prescribed with respect to the guardian of a minor.

"4983. Judicial determination of incapacity. After his incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor designate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined."

4. That pursuant to the acts of Congress and the laws of the State of Oklahoma, as aforesaid, proceedings were duly had in the County Court of Okmulgee County, Oklahoma, said county being the residence of Jackson Barnett, whereby on the 29th day of April, 1912, Jackson Barnett was adjudged to be mentally incom-

98 petent, and Carl J. O'Hornett was appointed guardian of his person and estate, who thereupon duly qualified and assumed the duties of such guardianship and continued to act in such capacity until the 18th day of June, 1923, at which time he resigned and Elmer S. Bailey was on said date appointed the successor of the said Carl J. O'Hornett. That said Elmer S. Bailey on said date duly qualified as the guardian of said incompetent, and assumed the duties of such guardianship, and has been at all times since and now is acting in such capacity.

5. That at all times prior to the transaction involved in this action, Jackson Barnett was recognized as a mental incompetent and Carl

J. O'Hornett was recognized as his legal guardian by the Secretary of the Interior of the United States of America, by the Commissioner of Indian Affairs, by the Superintendent for the Five Civilized Tribes, and by all other officers or branches of the Department of the Interior with which he came in contact, and large sums of money held for said incompetent by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid to said guardian for the use and benefit of said incompetent upon orders of the County Court of Okmulgee County, Oklahoma, and that no part of the funds of said incompetent held by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid out other than to or through said Carl J. O'Hornett as the guardian of said incompetent upon orders of said County Court.

6. That subsequent to the appointment of Carl J. O'Hornett
99 as such guardian and upon appropriate orders of the County Court of Okmulgee County, Oklahoma, he entered into an oil and gas mining lease with H. U. Bartlett, as lessee, covering the allotment of said incompetent. That said lease was made for a period of ten years and as much longer thereafter as oil or gas should be produced, and was made on a form prescribed by the Secretary of the Interior and provided for the payment of the royalties therein reserved to the United States Indian superintendent for the use and benefit of Jackson Barnett. Said lease was duly approved by the Secretary of the Interior.

7. That pursuant to said lease the lessor and his assigns entered upon said allotment of land and drilled oil and gas wells and produced large quantities of oil and gas, and the royalties reserved in said lease were paid to the United States Indian superintendent until that office was abolished on August 1, 1914, and thereafter said royalties were paid to the Superintendent for the Five Civilized Tribes, which office was created in lieu of the office of the United States Indian superintendent.

8. That prior to February, 1923, out of the royalties and rentals from said lease, there had been accumulated in the hands of the Superintendent for the Five Civilized Tribes a sum in excess of $1,100,000, and that prior to February, 1923, said money to the extent of $1,100,000 had been invested in United States Liberty loan bonds and said bonds were, on said date, in the hands of the Secretary of the Interior.

9. That in the month of February, 1920, one Anna Laura Lowe took said Jackson Barnett from his home in Okmulgee County,
100 Oklahoma, to Coffeyville, Kansas, where she procured a marriage license and went through a purported marriage ceremony with said incompetent, and thereafter claimed and now claims to be the lawful wife of said incompetent, and goes by the name of Anna Laura Barnett, by which name she will be hereinafter referred to. That immediately thereafter said Anna Laura Barnett employed one Harold McGugin, a lawyer of Coffeyville, Kansas, who immedi-

ately started negotiations with the Secretary of the Interior and his subordinates for the purpose of acquiring for Anna Laura Barnett from the estate of Jackson Barnett, then in the hands of the Secretary of the Interior, or the Superintendent for the Five Civilized Tribes, a large portion of his estate, which negotiations culminated in February, 1923, in the delivery by the Honorable Albert B. Fall, the then Secretary of the Interior of United States, liberty loan bonds of the par value of $550,000 to Anna Laura Barnett, and to the American Baptist Home Mission Society, United States liberty loan bonds of the par value of $550,000, all of said bonds being the property of Jackson Barnett.

10. That said gifts were made upon the written request of Jackson Barnett, addressed to the Secretary of the Interior, signed by the thumb mark of said incompetent, and that said gifts were made without the knowledge or consent of Carl J. O'Hornett, guardian of Jackson Barnett, or of the County Court of Okmulgee County, Oklahoma.

11. That the acts of Congress conferring on the County Courts of Oklahoma jurisdiction of the guardianship of incompetent
101 Creek Indians constitutes said county courts for that purpose Federal agencies, and the guardianships thereby imposed are Federal restrictions. And that by reason thereof, and by reason of the appointment by the County Court of Okmulgee County, Oklahoma, of a guardian for Jackson Barnett, as aforesaid, and by reason of the incompetency of Jackson Barnett, the Secretary of the Interior was without power or authority to make said gifts upon the request of Jackson Barnett, as aforesaid.

12. That the United States Liberty loan bonds delivered to the American Baptist Home Mission Society, as aforesaid, were deposited in the Equitable Trust Company of New York City, under a certain trust agreement between the American Baptist Home Mission Society and the Equitable Trust Company, defendants herein, whereby the income from said bonds to the extent of $20,000 per annum is payable to Jackson Barnett during his life-time, and all income in excess of said amount is payable to the American Baptist Home Mission Society, and that said bonds or the proceeds thereof are now in the hands of the Equitable Trust Company, and that large sums of interest have been collected by the Equitable Trust Company, which it still holds in its possession, the exact amount of which is to this intervenor unknown, but that said information is in the possession of defendants.

That intervenor has no complete and adequate remedy at law.

Wherefore, the premises considered, intervenor prays:

1. That the defendants, the Equitable Trust Company and
102 the American Baptist Home Mission Society, may be declared to have received and held the United States Liberty loan bonds heretofore described and amounting to the sum of $550,000 par value as the property of Jackson Barnett.

2. That the defendants, Equitable Trust Company and the American Baptist Home Mission Society, be declared to hold said bonds or the proceeds thereof, and all interest and profits received therefrom for the use and benefit of Jackson Barnett, and that said defendants be required to fully account for said bonds and the proceeds thereof, and all interest and profits therefrom, and that after deducting the reasonable expenses incident to this litigation said bonds or the proceeds thereof and the interest and profits thereon be delivered or paid over to the Secretary of the Interior of the United States; that the defendants, Equitable Trust Company and the American Baptist Home Mission Society, be decreed to have no right, title, or interest in and to said bonds or the proceeds thereof, or the interest thereon, and that intervenor have such other and further relief as to the court may seem meet and proper.

UNITED STATES OF AMERICA,
By B. M. PARMENTER,
Assistant Attorney General.
NAT M. LACY,
Special Assistant to the Attorney General.
EMORY R. BUCKNER,
United States District Attorney.

103 [*Duly sworn to by Nat M. Lacy; jurat omitted in printing.*]

104 In United States District Court

[Title omitted.]

Opinion of Thacher, D. J., on motion of United States for leave to intervene

This is a motion made by the United States of America for leave to intervent in this suit and to file its intervening petition herein, which was presented with the motion. Intervention is opposed by the defendant The American Baptist Home Mission Society, but not by any other party to the suit.

From the complaint it appears that suit is brought in the name of Jackson Barnett by Elmer S. Bailey, as his next friend, who it is alleged was appointed as guardian of his person and estate under a decree of the County Court of Okmulgee County, Oklahoma, declaring him to be mentally incompetent. It is alleged in the complaint that Jackson Barnett is a full-blood member of the Muskogee or Creek Tribe of Indians, and is 75 years of age. As a member of this tribe certain lands in the Indian Territory
105 were allotted to him under the laws of the United States.

In August, 1912, under the supervision of the Secretary of the Interior, a lease of these lands was made and executed by Jackson Barnett and Carl J. O'Hornett, as guardian under the original decree of the County Court of Okmulgee County, declaring Bar-

nett to be mentally incompetent. This lease provided for the payment of royalties for oil and gas produced on the property to the United States Indian superintendent for Jackson Barnett, and there have been paid thereunder to the United States Indian superintendent, prior to August, 1914, and thereafter to the Superintendent for the Five Civilized Tribes, large sums of money. Prior to December 15, 1922, these accumulated payments in the hands of the Superintendent for the Five Civilized Tribes, for the use and benefit of Jackson Barnett, were in excess of $1,100,000, which sum, prior to that date, was transferred by the Superintendent for the Five Civilized Tribes to the Secretary of the Interior, and by him invested in United States Liberty loan bonds. Of these bonds $550,000 par values were, with the approval of the Secretary of the Interior, pursuant to an instrument of gift which bears the thumb-mark of Jackson Barnett, delivered to the defendant The American Baptist Home Mission Society, and in turn delivered by it to the defendant The Equitable Trust Company of New York under an agreement that said trust company should hold the bonds or the proceeds thereof as trustee during the life of Jackson Barnett, meanwhile paying all income therefrom in excess of $20,000 in any one year
106 to the American Baptist Home Mission Society, and upon Barnett's death to deliver said bonds, or the proceeds thereof, to the American Baptist Home Mission Society.

It is alleged that the Secretary of the Interior was wholly without jurisdiction or authority to approve this distribution from the estate of Jackson Barnett, or to pay out or authorize the payment of said funds to any person other than to or through his legal guardian upon proper order of the County Court of Okmulgee County, Oklahoma.

There are many other allegations in the complaint which need not be referred to at this time upon which relief in this court is sought, including a decree declaring that the property and its avails was received and is now held by the trust company as the property of the plaintiff, impressing the same with a trust in favor of the plaintiff, requiring the defendants to account and to transfer and turn over the property and its avails to the plaintiff.

The United States by its petition asserts the mental incompetence of Jackson Barnett, the jurisdiction of the County Court of Okmulgee County, Oklahoma, its decree under which Jackson Barnett was adjudged to be mentally incompetent, and the appointment first of Carl J. O'Hornett as guardian of his person and estate, and later, upon O'Hornett's resignation, of Elmer S. Bailey, as such guardian; that the Secretary of the Interior was without power or authority to make the gift in suit upon the request of Jackson Barnett, and in its prayer for relief prays that the defendants may be declared to have received and held the United States Liberty loan
107 bonds amounting to $550,000 par value as the property of Jackson Barnett, and may be declared to hold said bonds,

or the proceeds thereof, for his use and benefit, and be required to fully account therefor, and after deducting the reasonable expenses incident to this litigation to deliver said bonds, and the proceeds thereof, to the Secretary of the Interior of the United States.

The motion and the petition are signed in the name of the United States of America by B. M. Parmenter, Assistant Attorney General; Nat M. Lacy, special assistant to the Attorney General; and Emory R. Buckner, United States attorney for the Southern District of New York. The interest of the United States in this litigation is apparent if upon its successful termination the Secretary of the Interior is entitled to receive the trust estate and its avails. It is sufficient to say that this claim, asserted by the Attorney General and the United States attorney, is certainly not frivolous upon its face, and therefore may be presented by intervening petition for consideration, and determination by the court. It is, however, insisted that neither the Attorney General, his assistants, nor the United States attorney are authorized to assert such a claim in behalf of the United States in the absence of request by the Secretary of the Interior or direction from the President of the United States.

The Revised Statutes defining the duties and powers of the Attorney General as the head of the Department of Justice provide that he "may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of
108 the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so." (R. S., 359.) And further: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States." (R. S., 367.) The duty of general superintendence and direction over United States attorneys as to the manner of discharging their respective duties is imposed upon the Attorney General by section 362, R. S.; and by section 771, R. S., it is made the duty of every district attorney to prosecute in his district "all civil actions in which the United States are concerned." By the act of June 30, 1906 (ch. 3925, Compiled Statutes, sec. 534), it is provided: "The Attorney General, or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

By these statutes intervention in this suit in order to assert and protect the alleged interest of the United States as custodian

100 of the restricted property of Jackson Barnett is fully authorized without special act of Congress, direction of the President of the United States, or request of the Secretary of the Interior. U. S. v. San Jacinto Tin Co., 125 U. S. 273; Kern River Co. v. U. S., 257 U. S. 147, 154–155; Ponzi v. Fessenden, 258 U. S. 254, 262; Sanitary District v. U. S., 266 U. S. 405, 426.)

When the Attorney General appears in a court of justice to assert the rights of the United States, questioning the action of a Cabinet officer (in this case the Secretary of the Interior) as unauthorized by law, he appears for and represents the sovereign, and it is not the function of the court to look beyond the statutes authorizing him to do so, or to inquire into the correspondence which may have passed between him and the head of the department whose action is questioned. The motion of the United States for leave to file its intervening petition herein is accordingly granted.

THOMAS D. THACHER.

Dated January 20, 1926.

110 In United States District Court

[Title omitted.]

Answer of Equitable Trust Co. to petition of intervention

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of the defendant The Equitable Trust Company of New York to the petition of intervention of the United States of America herein, respectively shows to this court as follows:

1. Answering the first paragraph of said petition, this defendant states that it is without knowledge whether the plaintiff, Jackson Barnett, is domiciled in the State of Oklahoma, and this defendant admits the other allegations therein contained.

2. Answering the second paragraph of said petition, this 111 defendant states that it is without knowledge of the age of said plaintiff, Jackson Barnett. It admits that he is and was at all the times mentioned in said petition uneducated and unable to read or write; but it denies that said plaintiff, Jackson Barnett, now is, or at any of the times mentioned in said petition was a mental incompetent, ignorant, or incapable of understanding or comprehending the value, condition, character, nature, or extent of his estate or any part thereof, or incapable of caring for himself or managing his property, or incapable of discerning or appreciating the motives or designs of any person or persons with whom he came in contact, or incapable of comprehending or understanding any of the written instruments, purported trusts, requests, or agreements mentions in said petition.

3. This defendant states that it is advised that it is not called upon the make answer to the third paragraph of said petition, the same containing mere conclusions of law.

4. Answering the fourth paragraph of said petition, this defendant states that it is without knowledge whether plaintiff was duly adjudged to be mentally incompetent by the County Court of Okmulgee County, Oklahoma, on or about April 29, 1912, or at any of the times mentioned in said petition, or whether said court then or at any of the times mentioned in said petition had jurisdiction of plaintiff's person or estate, or whether said county was at that time the place of residence of plaintiff, or whether said proceedings mantioned in said paragraph were had pursuant to the acts
112 of Congress or the laws of the State of Oklahoma referred to in the fourth paragraph of said petition, or whether on or about April 29, 1912, or at any of the times mentioned in said petition, a guardian of the person or estate of said plaintiff was appointed by the said County Court of Okmulgee County, or whether the guardian, if any, so appointed, thereupon duly qualified or acted as such until June 13, 1923, or, on said date or at any other time, resigned, or whether Elmer S. Bailey was thereupon appointed as the successor of said guardian, or whether said Elmer S. Bailey duly qualified as such guardian or assumed the duties thereof, or whether then or at any time since he had acted or is now acting in such capacity, and therefore holds plaintiff to strict proof of all thereof.

5. Answering the fifth paragraph of said petition, this defendant states that it is without knowledge whether at all times prior to the transactions complained of in said petition or at any other time said plaintiff Jackson Barnett, was recognized as a mental incompetent and Carl J. O'Hornett as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent for the Five Civilized Tribes, and by all other officers and branches of the Department of the Interior with whom said plaintiff, Jackson Barnett, came in contact, or as to what, if any, sums of money held for plaintiff by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid to said Carl J. O'Hornett for the use and benefit of plaintiff upon orders of the County Court of Okmulgee County, Oklahoma, or whether
113 any part of plaintiff's funds held by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid out other than to or through said O'Hornett as the alleged guardian of plaintiff upon orders of said County Court.

6. Answering the sixth paragraph of said petition, this defendant admits that on or about August 22nd, 1912, Carl J. O'Hornett, purporting to act as guardian for plaintiff, and upon an order of said County Court, entered into an oil and gas mining lease with H. U. Bartlett as lessee, covering the allotment to plaintiff, and that said lease was made for a period of ten years from the date of its approval by the Secretary of the Interior and as much longer thereafter as oil or gas should be found on said premises in paying quantities, and that said lease was made on a form prescribed by the Secretary of the Interior and provided for the payment of the royalties therein reserved to the United States Indian superintend-

ent for the the use and benefit of plaintiff, and that said lease was approved by the Secretary of the Interior, but this defendant states that it is without knowledge whether said O'Hornett had theretofore been appointed as guardian of plaintiff or whether said O'Hornett was then acting as such guardian.

7. Answering the seventh paragraph of said petition, this defendant admits the allegations therein contained.

8. Answering the eighth paragraph of said petition, this defendant admits the allegations therein contained.

114 9. Answering the ninth paragraph of said petition, this defendant denies that at any time therein mentioned plaintiff was incompetent. It admits that Anna Laura Barnett claims to be the lawful wife of plaintiff and goes by said name, and it also admits that in February, 1923, the then Secretary of the Interior delivered to said Anna Laura Barnett United States Liberty loan bonds of the par value of $550,000, and that said Secretary of the Interior also in February, 1923, delivered to the defendant The American Baptist Home Mission Society United States Liberty loan bonds of the par value of $550,000, and that all of said bonds were, prior to said delivery, the property of plaintiff, but defendant states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

10. Answering the tenth paragraph of said petition, this defendant admits that said gifts were made upon the written request of plaintiff addressed to the Secretary of the Interior, signed by the thumb mark of plaintiff, but this defendant states that it is without knowledge as to whether said gifts were made without the knowledge or consent of said O'Hornett, the alleged guardian of plaintiff, or without the knowledge or consent of the County Court of Okmulgee County, Oklahoma.

11. This defendant states that it is advised that it is not called upon to make answer to the eleventh paragraph of said petition, the same containing mere conclusions of law.

115 12. Answering the twelfth paragraph of said Petition, this defendant admits all of the allegations therein contained.

13. This defendants denies that said intervenor has no complete and adequate remedy at law.

And this defendant further says as a separate and distinct defense to said petition.

14. The plaintiff is a full-blood member of the Muskogee or Creek Tribe or Nation of Indians, which is one of the Five Civilized Tribes, and he is and at all times hereinafter mentioned was a so-called "restricted Indian," and as such was and is, under the Constitution and laws of the United States, both as to his person and property, under the special charge, control, and protection of the Secretary of the Interior of the United States; that prior to February 1, 1923, the plaintiff, as a member of the Creek or Muskogee Tribe or Nation of Indians, was duly allotted and received as his distribution, portion, or share of the lands of the Creek Nation certain property in Creek

County, Oklahoma, described as the southeast quarter of section five (5), township seventeen (17), Range 7 east; that under the laws of the United States said land was restricted land; and that thereafter said land was duly leased for oil and gas purposes an pursuant to the terms an conditions of the agreement under which said land was leased, sums of money were from time to time duly paid to the Secretary of the Interior on account of royalties and bonuses
116 payable under said lease, which said sums of money were restricted funds in the hands of the Secretary of the Interior; that thereafter out of said sums of money the Secretary of the Interior, pursuant to authority conferred upon him by the laws of the United States, duly purchased the $550,000 principal amount of Liberty loan bonds referred to in said petition; that on or about February 1, 1923, the Secretary of the Interior, at the request and with the knowledge and consent of the plaintiff and pursuant to authority conferred upon him by the laws of the United States, duly delivered to the defendant The American Baptist Home Mission Society the $550,000 principal amount of Liberty loan bonds referred to in said petition, to be by it delivered to this defendant under a trust agreement to be approved by the Secretary of the Interior, and thereafter said defendant The American Baptist Home Mission Society duly delivered said bonds to this defendant under a trust agreement approve by the Secretary of the Interior, a copy of which is annexed to the answer of this defendant to the amended bill of complaint herein and marked "Exhibit A," and that they have been and at all times since then and now are held by this defendant under the provisions of said trust agreement; that by the execution of said trust agreement and the delivery of said bonds as aforesaid, a valid trust was created upon the terms and conditions set forth in said trust agreement and the same is now in all respects a valid trust, and this defendant holds said $550,000 principal amount of Liberty loan bonds for the uses and purposes set forth in said trust agree-
117 ment. That the Secretary of the Interior as a further condition of said transaction in respect to said bonds required said defendant The American Baptist Home Mission Society to execute and deliver to him a certain declaration of trust of which a copy is annexed to the answer of this defendant to the amended bill of complaint herein and marked "Exhibit B." That neither the plaintiff nor any person claiming by, through, or under him, or representing him as guardian or committee or otherwise, no said intervenor, has any right to question or attack in any way the validity of said trust created by the execution of said trust agreement and the delivery of said bonds to this defendant as aforesaid, or the validity or conclusiveness of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior as aforesaid, is subject to review by this or any other court.

Wherefore this defendant prays that said petition be dismissed and for judgment for its costs in this behalf incurred.

MURRAY, ALDRICH & ROBERTS,
Solicitors for Defendant,
The Equitable Trust Company of New York,
37 Wall Street, New York City.

118 In United States District Court

[Title omitted.]

Answer of The American Baptist Home Mission Society to the petition of intervention

The answer of the defendant The American Baptist Home Mission Society to the petition of intervention of the United States herein respectfully shows to the court as follows:

1. Answering the first paragraph of said petition, this defendant admits the allegations therein contained.

2. Answering the second paragraph of said petition, this defendant states that it is without knowledge of the age of said Jackson Barnett; it admits that he is and was at all the times mentioned in said petition, uneducated, and unable to read or write, but it denies that said Jackson Barnett now is or at any of the times mentioned
119 in said petition, was an imbecile, ignorant, or incapable of understanding or comprehending the value, condition, character, nature, or extent of his estate or any part thereof; or incapable of caring for himself or managing his property, or incapable of discerning or appreciating the motives or designs of any person or persons with whom he came in contact, or incapable of comprehending or understanding any of the written instruments, trusts, requests, or agreements mentioned in said petition.

3. This defendant states that it is advised that it is not called upon to make answer to paragraph 3 of said petition, the same containing mere conclusions of law.

4. Answering the fourth paragraph of said petition, this defendant states that it is without knowledge whether plaintiff was duly adjudged to be mentally incompetent by the County Court of Okmulgee County, Oklahoma, on or about April 29th, 1912, or at any of the times mentioned in said petition had jurisdiction of either plaintiff's person or estate, or whether said county was at that time the place of residence of plaintiff, or whether said proceedings mentioned in said paragraph were had pursuant to the acts of Congress or the laws of the State of Oklahoma referred to in paragraph 4 of said petition, or whether on or about April 29th, 1912, or at any of the times mentioned in said petition, a guardian of the person or estate of plaintiff was appointed by the said County Court of Okmulgee County, or whether the guardian, if any, so appointed there-

120 upon duly qualified or acted as such until the 13th June, 1923, or on said date or at any other time resigned, or whether Elmer S. Bailey was thereupon appointed as the successor of said guardian, or whether said Elmer S. Bailey duly qualified as such guardian, or assumed the duties thereof, or whether then or at any time since he has acted or is now acting in such capacity, and therefore holds plaintiff to strict proof of all thereof.

5. Answering the fifth paragraph of said petition, this defendant states that it is without knowledge whether at all times prior to the transactions complained of in said petition or at any other time said Jackson Barnett was recognized as a mental incompetent, and Carl J. O'Hornett, as his legal guardian by the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent for the Five Civilized Tribes, and by all other officers and branches of the Department of the Interior with whom said Jackson Barnett came in contact, or as to what, if any, sums of money held for plaintiff by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid to said Carl J. O'Hornett for the use and benefit of plaintiff upon orders of the County Court of Okmulgee County, Oklahoma, or whether any part of plaintiff's funds held by the Secretary of the Interior or the Superintendent for the Five Civilized Tribes were paid out other than to or through said O'Hornett as the alleged guardian of plaintiff, upon orders of said County Court.

6. Answering the sixth paragraph of said petition, this de-
121 fendant admits that on or about August 22nd, 1912, Carl J. O'Hornett, purporting to act as guardian for plaintiff, and upon an order of said County Court entered into an oil and gas mining lease with H. U. Bartlett as lessee, covering the allotment to plaintiff, and that said lease was made for a period of ten years from the date of its approval by the Secretary of the Interior and as much longer thereafter as oil or gas should be found on said premises in paying quantities, and that said lease was made on a form prescribed by the Secretary of the Interior and provided for the payment of the royalties therein reserved to the United States Indian superintendent for the use and benefit of plaintiff, and that said lease was approved by the Secretary of the Interior, but this defendant states that it is without knowledge whether said O'Hornett had theretofore been appointed as guardian of plaintiff or whether said O'Hornett was then acting as such guardian.

7. Answering the seventh paragraph of said petition, this defendant admits the allegations therein contained.

8. Answering the eighth paragraph of said petition, this defendant admits the allegations therein contained.

9. Answering the ninth paragraph of said petition, this defendant denies that at any time therein mentioned plaintiff was incompetent. It admits that Anna Laura Barnett claims to be the lawful wife of plaintiff and goes by said name, and it also admits that
122 in February, 1923, the then Secretary of the Interior delivered

to said Anna Laura Barnett United States Liberty Loan bonds of the par value of $550,000, and that said Secretary of the Interior also in February, 1923, delivered to this defendant United States Liberty loan bonds of the par value of $550,000 and that all of said bonds were, prior to said delivery, the property of plaintiff, but defendant states that it is without knowledge in respect to all of the other matters set forth in said paragraph.

10. Answering the tenth paragraph of said petition, this defendant admits that said gifts were made upon the written request of plaintiff addressed to the Secretary of the Interior, signed by the thumb mark of plaintiff, but this defendant states that it is without knowledge as to whether said gifts were made without the knowledge or consent of said O'Hornett, the alleged guardian of plaintiff, or without the knowledge or consent of the County Court of Okmulgee County, Oklahoma.

11. This defendant states that it is advised that it is not called upon to make answer to paragraph 11 of said petition, the same containing mere conclusions of law.

12. Answering the twelfth paragraph of said petition, this defendant denies that it knows the exact amount of the interest upon said bonds mentioned in said petition collected by defendant Equitable Trust Company and which the latter still holds in its possession, and this defendant admits all the other allegations contained in said paragraph.

123 13. This defendant denies that said intervenor has no complete and adequate remedy at law.

And this defendant further says as a separate and distinct defense to said petition:

14. The plaintiff is a full-blood member of the Muskogee or Creek Tribe or Nation of Indians, which is one of the Five Civilized Tribes, and he is and at all times hereinafter mentioned was a so-called "restricted Indian," and as such was and is, under the Constitution and laws of the United States, both as to his person and property, under the special charge, control, and protection of the Secretary of the Interior of the United States; that prior to February 1, 1923, the plaintiff, as a member of the Creek or Muskogee Tribe of Nation of Indians, was duly allotted and received as his distribution, portion, or share of the lands of the Creek Nation certain property in Creek County, Oklahoma, described as the southeast quarter of section five (5), Township seventeen (17), Range 7 east; that under the laws of the United States said land was restricted land; and that thereafter said land was duly leased for oil and gas purposes and pursuant to the terms and conditions of the agreement under which said land was leased sums of money were from time to time duly paid to the Secretary of the Interior on account of royalties and bonuses payable under said lease, which said sums of money were restricted funds in the hands of the Secretary of the Interior; that thereafter out of said sums of money the Secretary of the Interior,

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124 pursuant to authority conferred upon him by the laws of the United States, duly purchased the $550,000 principal amount of Liberty loan bonds referred to in said petition; that on or about February 1, 1923, the Secretary of the Interior, at the request and with the knowledge and consent of the plaintiff and pursuant to authority conferred upon him by the laws of the United States, duly delivered to this defendant the $550,000.00 principal amount of Liberty loan bonds referred to in said petition, to be by it delivered to defendant The Equitable Trust Company of New York under a trust agreement to be approved by the Secretary of the Interior, and thereafter this defendant duly delivered said bonds to the defendant The Equitable Trust Company of New York under a trust agreement approved by the Secretary of the Interior, a copy of which is annexed to the answer of this defendant to the amended bill herein and marked "Exhibit A," and that they have been and at all times since then and now are held by the Equitable Trust Company of New York under the provisions of said trust agreement; that by the execution of said trust agreement and the delivery of said bonds as aforesaid a valid trust was created upon the terms and conditions set forth in said trust agreements, and the same is now in all respects a valid trust and the defendant The Equitable Trust Company of New York holds said $550,000 principal amount of Liberty loan bonds for the uses and purposes set forth in said trust agreement. That the Secretary of the Interior as a further condition of said transaction in respect to said bonds required this defendant to execute and deliver to him a certain declaration of
125 trust of which a copy is annexed to the answer of this defendant to the amended bill herein and marked "Exhibit B." That neither the plaintiff nor any person claiming by, through, or under him, or representing him as guardian or committee or otherwise, nor said intervenor, has any right to question or attack in any way the validity of said trust created by the execution of said trust agreement and the delivery of said bonds to the defendant The Equitable Trust Company of New York as aforesaid, or the validity or conclusiveness of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior in connection therewith, and that none of the acts of the Secretary of the Interior as aforesaid, is subject to review by this or any other court.

Wherefore this defendant prays that said ptition be dismissed and for judgment for its costs in this behalf incurred.

THE AMERICAN BAPTIST HOME MISSION SOCIETY,
By CHARLES S. FETTRETCH, *General Counsel.*

CHAS. B. ROGERS,
CHAS. S. FETTRETCH,
Attorneys for the American Baptist Home Mission Society.

126 In United States District Court

[Title omitted.]

Order granting application for expense money

Mar. 2, 1926

A motion having been made for an allowance of $3,000, out of the income in the hands of the defendant Equitable Trust Company, to be used by the prochein ami in defraying expenses of the prosecution of this suit, and said motion having been argued on October 27, 1925, and decision thereof having been deferred by consent of the parties pending an application of the United States of America
127 for leave to intervene, and said motion having been again heard after the entry of the order of January 29, 1926, granting said motion of the United States for leave to intervene:

Now, upon reading the notice of said motion and the affidavits of Elmer S. Bailey, Carl J. O'Hornett, and Rayburn L. Foster, verified September 18, 1925, the affidavits of Carroll G. Walter, verified September 23 and October 31, 1925, and the joint affidavit of R. L. Foster and A. D. Cochran, verified November 7, 1925, in support of said motion, and the affidavits of Charles S. Fettretch and Harrison Tweed, verified October 26, 1925, in opposition thereto; and upon reading the response of the United States of America to said motion; and after hearing Carroll G. Walter, of counsel for the plaintiff, in support of said motion, and Harrison Tweed, Esq., of counsel for the Equitable Trust Company, and Charles S. Fettretch, Esq., and L. O. Lyttle, Esq., of counsel for the defendant mission society, in opposition thereto, and after hearing Assistant United States Attorney Crawford on behalf of the United States of America; and due deliberation having been had: It is

Ordered that said motion be, and the same is hereby, granted; and that the defendant The Equitable Trust Company of New York be, and it is hereby, authorized and directed to pay to Elmer S. Bailey, the prochein ami herein, out of the income said defendant has received from the $550,000 of bonds now in its possession as set forth in the pleadings herein, the sum of $3,000 to be used by said prochein ami in defraying expenses of the prosecution of this suit, which payment shall be made by paying $1,000 to Patterson,
128 Eagle, Greenough & Day, solicitors of record for the plaintiff herein, and by paying $2,000 to the firm of Hummer & Foster, counsel for the plaintiff herein at Henryetta, Oklahoma; and it is further

Ordered that said $3,000 shall be applicable only to such expenses of this suit as shall hereafter be allowed and approved by this court. Expenses incurred for the benefit of all suits heretofore brought by said Bailey for the recovery of any part of the $1,100,000 mentioned in the amended bill herein shall be deemed expenses of this suit to

the extent of such proportion of the total thereof as the amount claimed in this suit bears to the amount claimed in all such suits, which proportion the parties agree is 550/915.

THOMAS D. THACHER, *U. S. D. J.*

129 In United States District Court

[Title omitted.]

Order permitting amended petition of intervention by United States

April 23, 1926

The United States of America having presented an amended petition of intervention and asked leave to file the same herein:

Now, upon motion of Emory R. Buckner, United States attorney, and upon the subjoined consent of the plaintiff and defendants, it is

130 Ordered that leave to file said amended petition of intervention be, and the same is hereby, granted, and that said petition be, and the same hereby is, ordered on file in this cause; and it is further

Ordered that without the filing of any formal answers to said amended petition by the defendants all allegations of fact contained therein shall be deemed denied by them for want of knowledge, except such facts as are admitted by the defendants in their answers to the amended bill of complaint herein and to the original petition of intervention of the United States; and that his cause henceforth proceed as if formal answers to said amended petition had been filed.

T. D. THACHER, *U. S. D. J.*

We hereby consent to the entry of the foregoing order.

PATTERSON, EAGLE, GREENOUGH & DAY,
Solicitors for Plaintiff:
MURRAY, ALDRICH & ROBERTS,
Solicitors for the Equitable Trust Company of New York.
CHARLES S. FETTRECH,
Solicitor for the American Baptist Home Mission Society.

131 In United States District Court

[Title omitted.]

Amended petition of intervention of the United States

Comes now the United States of America, having first been granted leave of court to file this, its amended petition of intervention, and complains herein of the defendants, The Equitable Trust

Company, a corporation, and The American Baptist Home Mission Society, and for its cause of complaint and action alleges:

1. That Jackson Barnett is a full-blood member and citizen of the Creek Tribe of Indians, duly enrolled as such opposite roll No. 4254, and is a citizen and resident of the United States, with his legal domicile at all times herein mentioned in the State of Oklahoma. That as such citizen and member of the said Creek Tribe of Indians there was allotted to him as his distributive share of the lands
132 of the Creek Nation, one hundred and sixty (160) acres of land described as the southeast quarter of section 5, Township 17 north, of Range 7 east, located in Creek County, State of Oklahoma.

2. That said Jackson Barnett is approximately of the age of seventy-five (75) years and at all times herein mentioned was, and now is, a mental incompetent, illiterate, and unable to read or write, and at all times mentioned herein was wholly incapable of understanding or comprehending the value, condition, character, nature, or extent of his property, as well as incapable of caring for himself or his property and at all times incapable of discerning and understanding the motives and designs of persons with whom he came in contact and incapable of comprehending or understanding the import or nature of simple instruments of writing, and particularly was wholly incapable of comprehending or understanding the purported trusts, instruments, agreements, and transactions hereinafter mentioned.

3. That prior to April, 1912, the Congress of the United States, by statutory enactments, had conferred upon the County Courts of the State of Oklahoma, the courts therein exercising exclusive probate jurisdiction, full, complete, and exclusive jurisdiction in matters of guardianship of the persons and estates of minors and incompetents, whether Indians, freedmen, or otherwise, with limited authority lodged in the Secretary of the Interior to remove restrictions as to restricted Indian lands of members of said tribe, which laws, at all times herein complained of, remained and were in full
133 force and effect; that at the time of the enactment of said acts of Congress and at all times since there were in full force and effect, as forming the applicable statute laws of the State of Oklahoma, the following statutory provisions thereof now shown as a part of the Compiled Statutes of Oklahoma, 1921, and which are designated and which read as follows:

"1449. PETITIONS FOR GUARDIANS OF INCOMPETENT OR INSANE PERSONS. When it is represented to the county court, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

"1450. GUARDIAN APPOINTED WHEN. If after a full hearing and examination upon such petition, it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article (chapter) specified.

"1451. BONDS AND POWERS OF GUARDIAN. Every guardian appointed as provided in the preceding section, has the care and custody of the person of his ward, and the management of all
134 his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions, as before prescribed with respect to the guardian of a minor.

"4983. JUDICIAL DETERMINATION OF INCAPACITY. After his incapacity has been judicially determined a person of unsound mind can make no conveyance or other contract, nor designate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined."

4. That under said laws of the State of Oklahoma and the said acts of Congress of the United States, the departments of the United States Government, and particularly the Department of the Interior thereof, the United States courts and all courts of the State of Oklahoma, have at all times recognized, construed, and adjudicated the said laws as conferring on the United States Government through its Department of the Interior a joint control with the said County Courts of Oklahoma and the guardians thereby appointed over the persons and estate of incompetent or minor Indians of said tribe, to the extent of a reserved power in the Secretary of the Interior of said United States to preclude alienation of restricted lands thereof and to remove restrictions therefrom and to approve or reject proposed alienation thereof, as might be proposed under the authority of said courts, by the guardian of such incompetent
135 or minor members of said tribe, all thereof recognizing the authority of said County Courts and the guardians of such incompetents and minors thereby appointed, to manage, control, and deal with the property of such incompetents and minors, subject to the further supervisory authority of said Department of the Interior through its said Secretary thereover, and to withhold payment of oil rents and royalties therefrom to such guardians until in the discretion of said Secretary of the Interior it should appear advisable so to do; that by the uniform decisions of said courts and by the uniform construction of said laws in harmony therewith by the said Secretary and officers of his said department, and thereby at all times observed, in its dealing with said character of incompetent and minor members of said tribe in the State of Oklahoma, and for a long time prior to the times herein complained of, it had been the practice and procedure thereof in dealing with said properties so to

recognize the guardians of incompetent and minor Indians and the authority and jurisdiction of the said County Courts thereover and the said laws of said State, all of which was at all times herein mentioned well known and understood by Anna Laura Lowe, Harold C. McGugin, Walter S. Keith, C. M. McGugin, and the William McGugin Investment Company, a corporation, and by other persons herein complained of, and all of whom at all said times well knew and understood that the said Secretary of the Interior, the Commissioner of Indian Affairs, and all officers of said department of Government, had so recognized the authority of the guardian of
136 the person and estate of said Jackson Barnett and the jurisdiction of the County Court of Okmulgee County, Oklahoma, thereover, and that said Jackson Barnett was a mental incompetent all for a period of more than ten years.

5. That, under authority of said laws, in proceedings duly had in said County Court, of which said county and State said Jackson Barnett was at all times mentioned a resident, the said County Court on the twenty-ninth day of April, 1912, did duly adjudge the said Jackson Barnett to be a mental incompetent and incapable of conducting and managing his business affairs and property, and did thereupon duly appoint one Carl J. O'Hornett as guardian of the person and estate of the said Jackson Barnett, under which appointment said Carl J. O'Hornett did duly qualify and at all times thereafter continued to act in said capacity until the thirteenth day of June, 1923, at which time he resigned and Elmer S. Bailey, the prochein ami herein, was duly appointed as guardian successor thereof by said County Court, and as such duly qualified and since said time has continued to act, and is now acting, in such capacity, and in which capacity he maintains this suit in this court.

6. That at all times since said appointment of said Carl J. O'Hornett as guardian as aforesaid, to the times of the acts and transactions of the said Secretary of the Interior and the Commissioner of Indian Affairs, and Anna Laura Lowe, Harold C. McGugin, Walter S. Keith, C. M. McGugin, and the William McGugin Investment Company, and of other persons herein named, all as hereinafter
137 complained of, the said Jackson Barnett was recognized, regarded, treated, and considered by the United States of America, by and through its said departmental officers and subordinates, as well as by the courts of Oklahoma in which the property interests of said Jackson Barnett were involved, as a mental incompetent both in fact and under said judicial determination, and at all said times said departmental officers, with the one exception as hereinafter complained of, transacted all of its departmental business in which the said Jackson Barnett and his property interests were involved, with and through the said guardian of said Jackson Barnett, and through and under said County Court, and at all said times recognized the said Carl J. O'Hornett as the duly qualified and acting guardian of the person and estate of the said Jackson Barnett, by approving an

oil and gas lease upon the said allotted tract of land made by said guardian and said Jackson Barnett and by paying at divers times to said Carl J. O'Hornett large sums of money as rents and royalties accruing under said lease in the hands of the said department as the property of said Jackson Barnett except as to the one time hereinafter particularly complained of, at which time, February 1, 1923, Albert B. Fall, then Secretary of the Interior, caused to be distributed and delivered all as hereinafter more particularly mentioned, one million and one hundred thousand dollars ($1,100,000.00) of the funds, consisting of United States Liberty loan bonds belonging to the said Jackson Barnett and then in the hands of said Secretary of the Interior.

138 7. That soon after the appointment of said Carl J. O'Hornett as guardian, and upon lawful order of said County Court, said Carl J. O'Hornett, as guardian, joined therein by said Jackson Barnett, executed an oil and gas lease in form prescribed by the said Secretary of the Interior, covering said described allotment of land and executed for the use and benefit of said Jackson Barnett, naming one H. U. Bartlett therein as lessee, said lease running for a period of ten (10) years and as long thereafter as oil and gas should be produced thereon, which said lease was on the thirteenth day of September, 1912, duly approved by the then Secretary of the Interior, the said lease expressly providing that payments of the reserved royalties and rents thereunder should be made to the United States Indian superintendent of Muskogee, Oklahoma, for the use and benefit of the said Jackson Barnett, under which said lease and from time to time said H. U. Bartlett, as lessee, paid into the hands of the said United States Indian superintendent as the depository designated in said lease, until August 1, 1914, at which time said office was abolished by act of Congress, and thereafter for some eight years paid as rents and royalties into the hands of the Superintendent for the Five Civilized Tribes at Muskogee, the succeeding depository under the acts of Congress, until the same had accumulated to an amount in excess of one million and one hundred thousand dollars ($1,100,000.00) and which was by direction of said Secretary of the Interior invested in United States Liberty loan bonds to the extent of one million and one hundred thousand dollars ($1,100,000.00), par value, and
139 in the name of and which were placed in the hands of the said Secretary of the Interior, Albert B. Fall, where said bonds remained until February 1, 1923, when the same were delivered by the said Secretary of the Interior and Commissioner of Indian Affairs to the persons and in the manner as hereinafter complained of.

8. That to a time shortly prior to the execution of said oil lease said tract of land was recognized as possessing but little value, and the said Jackson Barnett as possessing no wealth; that for a long time next prior to and up to the month of about February, 1920, the said tract of land had produced as rents and royalties for the oil therefrom in the hands of said Superintendent for said Five Civilized

Tribes and for said Jackson Barnett an amount in excess of one million dollars ($1,000,000.00), as a result of which up to said time great publicity had been given to the fact through the medium of the newspapers in Oklahoma and Kansas, together with the fact that said Jackson Barnett was an aged mental incompetent, unmarried, and under guardianship created by said County Court of Okmulgee County, Oklahoma, all of which matters had been stressed and given prominence by the press of said States. That one said Anna Laura Lowe, a women of about forty years of age, and who had previously had two marriage ventures, both soon terminating in the divorce courts, and who for eight years prior had had no place of abode other than temporary sojourns in rooming houses in the different cities throughout the country, and with a wide reputation as
140 an adventuress and one making her livelihood by immoral practices, and having visited and lived in different cities in Oklahoma for short periods of time, and having learned of the great wealth and situation and condition of said Jackson Barnett, as hereinbefore alleged, but not having met him, conceived sometime in January, 1920, a plan and design surreptitiously to abduct or kidnap the said Jackson Barnett, by going to his home located in the country some miles from the city of Okmulgee, Oklahoma, and there by seductive smiles, petting and persuasions, and without the knowledge of the said guardian, and with the intent to take advantage of his weak mentality, to induce the said Jackson Barnett to accompany her in an automobile, and without previous acquaintance and without an understanding of her purpose, to take and carry him away and consummate with him a pretended marriage, and thereby and in such manner, as might be thereafter deemed expedient and necessary, obtain the said wealth of the said Jackson Barnett and defraud him out of the same and by said marriage thwart and defraud the United States by impairing, obstructing, and defeating the United States in its governmental relationship over the person and property of the said Jackson Barnett and defeat the United States in the performance of its duty to the said Jackson Barnett as a ward of the nation, in connection with said County Court of Okmulgee County and the said guardian with respect to the person and estate of the said Jackson Barnett, and particularly as to the bonds and fund thereof in possession of the said officers of the Department of the
141 Interior. That thereupon in an attempt to carry out said fraudulent purpose and design, she, the said Anna Laura Lowe, did, about the last of January, 1920, procure an automobile and cause the same to be driven to the said home of said Jackson Barnett and did there by her seductive smiles, flatteries, pettings, and powers procure the said Jackson Barnett to enter her said automobile and to accompany her, and did take the said Jackson Barnett to Okemah and to Holdenville, county seat towns in Oklahoma, where she, the said Anna Laura Lowe, did apply for a marriage license, and where each was refused by the issuing officers by reason of each well knowing the incompetency of Jackson Barnett and the reputa-

tion of the said Anna Laura Lowe; that having failed in her said attempt the said Anna Laura Lowe returned said Jackson Barnett to his home. That again and on the twenty-second day of February, 1920, still having in mind the purpose and design to defraud the said Jackson Barnett and the United States, as aforesaid, she, the said Anna Laura Lowe, did again cause herself to be driven in an automobile to the home of said Jackson Barnett and in the night-time and without notice to said guardian, did again procure in the same manner the said Jackson Barnett to enter her automobile, without knowledge of said Jackson Barnett as to the purpose and plan and in the face of his mental incapacity to know and to understand the purpose, if explained, and with the purpose and intent of the said Anna Laura Lowe to carry out and effectuate her said fraudulent plan to defraud the said Jackson Barnett and the said United States,

142 did take and carry the said Jackson Barnett from his said home and by duress and force did confine him in said automobile and transport him to the city of Coffeyville in the State of Kansas, a distance of some one hundred and fifty miles by traveling throughout the night, and in which said town the said Anna Laura Lowe after procuring a marriage license did procure a marriage ceremony to be performed by a justice of the peace in said town of Coffeyville, pretending to unite herself in wedlock to the said Jackson Barnett; that following said pretended marriage the said Anna Laura Lowe for some days confined the said Jackson Barnett in a room in the said town of Coffeyville, and precluded his guardian and others interested in his welfare from communicating with him, thereafter taking the said Jackson Barnett to and into the State of Missouri, where a second marriage license was procured and a second marriage ceremony caused to be performed purporting to unite the said Anna Laura Lowe and the said Jackson Barnett in lawful wedlock, the said Jackson Barnett at no times knowing and understanding the relationship into which he was being caused to enter nor being able to consent thereto, other than by yielding and submitting because of his mental incapacity; that immediately following said first pretended marriage said Anna Laura Lowe assumed the name of Barnett in furtherance of her said fraudulent purpose and design and immediately advised the officers of the said Department of the Interior that she had become the wife of Jackson Barnett and directing that all funds of said Jackson Barnett in their hands should be held subject

143 to her direction as the wife of said Barnett; that prior to or soon after said pretended marriage the said Anna Laura Lowe made known to Harold C. McGugin her said purpose, plan, and scheme to defraud the said Jackson Barnett and the said United States, and both did thereafter confederate, conspire, and agree, each with the other, to co-operate to the end of accomplishing the same by obtaining the said funds, bonds, and property of the said Jackson Barnett, and in so doing, and in order to accomplish the same, to gain control of said Jackson Barnett by impairing, obstructing, and defeating the United States in the exercise of its governmental control,

as well as the said County Court of Okmulgee County, Oklahoma, and the said guardian, and to acquire under said fraudulent purpose, plan, scheme, and conspiracy a delivery of said funds and bonds of said Jackson Barnett to her, the said Anna Laura Lowe, or to herself and said Harold C. McGugin, by such means as might appear expedient in accomplishment of said fraudulent purpose, plan, scheme and conspiracy as aforesaid, whereunder each were to participate in the funds and property so fraudulently acquired; that in furtherance thereof and from time to time thereafter, said Anna Laura Lowe and said Harold C. McGugin frequently conferred in Kansas, Oklahoma, and Washington, D. C., in furtherance of said fraudulent purpose, plan, scheme, and conspiracy, until the times hereinafter specifically mentioned, when and in the manner hereinafter averred a consummation of said fraudulent scheme and conspiracy was accomplished.

9. That said oil lease, in the form prescribed by the Secretary of the Interior, designated the parties and reads as follows:

144 "This indenture of lease, made and entered into in quadruplicate on this fifth day of March, A. D., 1912, by and between Jackson Barnett and joined in by Carl J. O'Hornett as guardian of said Jackson Barnett, an incompetent, Gage, Oklahoma, enrolled as a full-blood citizen of the Creek Nation, roll No. 4524, party of the first part, hereinafter designated as lessor, and H. U. Bartlett, of Medford, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the act of Congress approved May 27, 1908 (35 St. L. p. 312), witnesseth."

That a further paragraph of said lease, therein designated "2," so far as applicable to this proceeding, provides and reads as follows:

"The lessee hereby agrees to pay or cause to be paid to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the lessor, as royalty, the sum of twelve and one-half per cent (12½%) of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of the sale or removal of the oil * * *"

That a further paragraph of said lease, therein designated "3," so far as applicable to this proceeding, provides and reads as follows:

"Until a producing well is completed on said premises the lessee shall pay or cause to be paid, to superintendent Indian agency,

145 Muskogee, Oklahoma, for lessor, as advance annual royalty, from the date of approval of this lease, fifteen cents ($.15) per acre per annum, annually, in advance, for the first and second years * * *"

That section 8 of said lease, so far as applicable to this case, provides and reads as follows:

"This lease shall be subject to the regulations of the Secretary of the Interior, now or hereinafter in force, relative to such leases, all of which regulations are made a part and condition of this lease,

provided, however, that no regulations made after the approval of this lease affecting either * * * the rates of royalty or payments thereunder * * * shall operate to affect the terms and conditions of this lease."

That the signatures of and the parties executing said oil lease, and the approvals of the officers of said Department of the Interior, as thereon appearing, are as follows, to wit:

"Attest:

"JACKSON (his mark) BARNETT. [SEAL.]
"H. U. BARTLETT. [SEAL.]
"CARL J. O'HORNETT, [SEAL.]

"*As Guardian of Jackson Barnett an incompetent.*

"By the request of Jackson Barnett I wrote his signature on
146 this instrument and he then affixed his mark in execution thereof in my presence.

"N. O. COX, *Witness.*

"The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

"DANA H. KELSEY,
"*United States Indian Superintendent.*

"DEPARTMENT OF THE INTERIOR,
"OFFICE OF INDIAN AFFAIRS,
"*Washington, D. C., Sept. 12, 1912.*

"Respectfully submitted to the Secretary of the Interior, with recommendation that it be approved.

"F. W. ABBOTT,
"*Assistant Commissioner.*

147 "DEPARTMENT OF THE INTERIOR,
"*Washington, D. C., Sept. 13, 1912.*

"Approved:

"LEWIS C. SAYLIN,
"*Assistant Secretary of the Interior.*

"Filed for record this 6th day of Mar., 1912, at 1.30 o'clock p. m.

"DANA H. KELSEY,
"By R. W. FIELD, *CCC.*"

10. That at all times herein mentioned the following rule and regulation, designated No. 24, promulgated by the Secretary of the Interior, under acts of Congress approved April 24, 1906, May 27, 1908, and February 14, 1920 (Public, No. 141 of 66th Congress), was in force and effect, to-wit:

"All royalties, rents, or payments had under leases which have been or may be approved by the Secretary of the Interior shall be paid to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, or to such other person as may be by the Secretary of

the Interior, for the benefit of the various lessors, or in cases of minors and incompetents, shall be deposited as hereinafter specified. No royalties on such leases shall be paid by the lessee direct to the lessors or to their representatives.

* * * * * * *

148 "All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be held by the Superintendent for the Five Civilized Tribes, or such other officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the judge of the County (probate) Court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be prescribed by the department) or upon authority of such court in the form of an order satisfactory to such superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes.

"Provided, however, That the said Superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes is authorized in his discretion, where considered for the best interests of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing under any lease have been paid to said superintendent, to withhold the disbursement of such royalties, rents, or payments, wholly or in part from any such adult or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor or his or her heirs."

149 11. That said acts of Congress conferred upon the Secretary of the Interior authority to prescribe the form of oil lease and to approve or reject proposed oil leases upon restricted lands of incompetent and minor Indians, members of said tribe, and to prescribe the terms and conditions to be incorporated into said lease and by implication, under said laws, to designate the depository into which the rents and royalties should be paid to the credit of the guardian of such incompetent or minor Indian, and to withhold payment thereof to such guardian until authorized by the County or Probate Court having jurisdiction of the person and estate of said incompetent or minor, and authority over said rents and royalties and concurred in and deemed advisable by the Secretary of the Interior and authorized and directed by him to be paid to such guardian and no greater authority or control thereover, it being the intent and purpose of said laws to recognize the jurisdiction of County Courts of Oklahoma and guardians thereby appointed over incompetent minor Indians of said tribes and their restricted estates, the United States to have joint control therewith over the restricted lands and the rents and royalties inuring to such incompetent and minor Indians therefrom to the end of doubly safeguarding the same.

12. That up to about the month of September, 1922, the said Anna Laura Lowe and said Harold C. McGugin had in furtherance of said fraudulent scheme and plan sought to procure releases of large amounts of said funds for various purposes through the action of the said County Court of Okmulgee County,
150 Oklahoma, and one A. J. Ward, attorney for the said Creek Indian Tribe, and having failed went to the city of Washington, causing the said Jackson Barnett to be taken thereto about said date, and there with said A. J. Ward and one M. L. Mott, both of whom were on intimate terms with and enjoyed the confidence of Charles N. Burke, the then Commissioner of Indian Affairs, and Albert B. Fall, the then Secretary of the Interior, which fact was well known by said Anna Laura Barnett and said Harold C. McGugin, did make known to said A. J. Ward and M. L. Mott the full plan, design, purpose, and scheme, and did then enter into an agreement with the said A. J. Ward and M. L. Mott whereby and whereunder they, the said Anna Laura Lowe, Harold C. McGugin, A. J. Ward, and M. L. Mott, would represent to the said Commissioner Burke and to the said Secretary Fall that the said Jackson Barnett desired to make a gift of five hundred and fifty thousand dollars ($550,000.00) of his said United States bonds then in the hands of said Secretary of the Interior to the said Anna Laura Lowe as his wife, and like amount to the defendant The American Baptist Home Mission Society, and further to represent thereto that said Jackson Barnett had full mental capacity to understand fully the nature and effect of such act, and to represent that many persons were preparing to involve the estate of said Jackson Barnett in litigation in event of his death, and to represent that said Anna Laura Lowe, by virtue of said marriage, became vested with a half inter-estate in all of the said property of said Jackson Barnett, and to represent that said marriage
151 was valid, and thereby to induce the said Secretary of the Interior and the said Commissioner of Indian Affairs to approve a purported request of said Jackson Barnett to make the gifts and accordingly to deliver the said funds and bonds, and to participate therein to the extent of the said Harold C. McGugin one hundred and fifty thousand dollars ($150,000.00), M. L. Mott fifteen thousand dollars ($15,000.00), and Anna Laura Lowe, as the wife, the remainder, and as to whom she was to make further payments, or deliveries, intervenor is without knowledge, but intervenor alleges that under said agreement the said A. J. Ward and M. L. Mott promised to aid and assist the said Anna Laura Lowe and said Harold C. McGugin, and go therewith to the said Secretary of the Interior and Commissioner of Indian Affairs and join in the making of said representations and to co-operate with said Anna Laura Lowe and said Harold C. McGugin, in inducing and influencing the said Commissioner and said Secretary of the Interior to approve said proposed gifts and to make delivery of said bonds accordingly. That immediately following the making

of said agreement and plan the said Anna Laura Lowe, Harold C. McGugin, A. J. Ward, and M. L. Mott began a series of conferences with and appeared before and in the office of said Secretary, the assistant thereto, and the said commissioner, in the city of Washington, taking therewith the said Jackson Barnett, who for a long time had been coached, trained, and tutored by said Anna Laura Lowe, Harold C. McGugin, and A. J. Ward to make responses to inquiries concerning his property and his desires with reference thereto and to the said Anna Laura Lowe as his
152 wife favorable to the making of said gifts, and who had been caused to sign by his thumb mark a purported request to said Secretary to make said gifts in accordance with the said fraudulent plan, purpose, and scheme, as a result of which conference and during all thereof said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott made and repeated said representations to said Secretary and the said Assistant Secretary and the said Commissioner, and caused the said Jackson Barnett to be thereat questioned concerning said matters in accordance with his said coaching, training, and tutoring and to make responses thereto favorable to the making of said gifts, and to state that he understood the effect and import of said pretended request, and said departmental officers, and said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott, well knowing that said guardian and County Court were without notice and would oppose the said proposed action by said departmental officers and the said Secretary Albert B. Fall and said Commissioner Charles H. Burke, as well as Anna Laura Lowe, Harold C. McGugin, A. J. Ward, and M. L. Mott, all well knowing that the laws, rules, and regulations as to the Secretary of the Interior, previously herein quoted, required said funds and bonds to be retained either by the officer of the department therein stated as the depository thereof, or in the hands of such other officers of the department as said Secretary might designate to the credit of said guardian and to be paid thereto as therein conditioned at the reasonable discretion of said Secretary and to no other person, the said Secretary Albert
153 B. Fall and the said Commissioner Charles H. Burke, cooperating and thereby intending to make an amendment to said rule and regulation as might enable said Secretary Albert B. Fall and the said Commissioner Charles H. Burke to carry out and consummate the said plan, purposes, and design of the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott, and to authorize the said Secretary Albert B. Fall and said Commissioner Charles H. Burke to assume exclusive jurisdiction over and power and control of disposition of the said funds and bonds to the exclusion of said guardian and said County Court, and to authorize said Secretary to determine the competency of said Jackson Barnett and to confer upon himself the powers of a probate court in such matters, and well knowing that said rule as then existing did not so authorize, and to justify his acts in so

doing, did, on the seventh day of October, 1922, make and promulgate, as an amendment to said rule and regulation, the following, to wit:

"And provided further, That in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for the benefit and use as the Secretary of the Interior may authorize in said cases."

154 13. That the said promulgated amendment to said rules and regulation was wholly void and without force and effect in that the same was not only not authorized by said acts of Congress, nor by any other acts thereof, but was contrary to the provisions, the purpose, and intent thereof, all as hereinbefore alleged, and the making thereof was an unwarranted, unlawful, and arbitrary act and an abuse of the limited discretionary powers conferred upon said Secretary of the Interior by Congress and in excess of his power and authority to make.

14. That after the promulgation of said amendment to said rule and regulation, and to wit, on or about the fifteenth day of December, 1922, the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott, in furtherance of said plan, purpose, and scheme to defraud said Jackson Barnett and the United States of America, as alleged, and under assurances thereto theretofore made by said Secretary Albert B. Fall and his official subordinates and by the said Commissioner Charles H. Burke that said pretended request of said Jackson Barnett for approval of said Secretary Albert B. Fall to said pretended request would be granted and the said bonds accordingly assigned and delivered by said Secretary Albert B. Fall, did, with the intent, purpose, and plan of accomplishing and consummating said design and plan and of receiving said bonds, appear before said Commissioner Charles H. Burke and said Secretary Albert B. Fall, or his official subordinates, and did there pre-

155 sent the said pretended written request of the said Jackson Barnett, bearing his thumb-print-signature, and there and without notice to or knowledge of the said guardian and said County Court did request delivery of said bonds to the said Anna Laura Lowe from the said departmental officers, receiving thereat the assurances of said departmental officers that said request would be granted and the said bonds accordingly delivered. That thereafter and on, to wit, the first day of February, 1923, and while said Jackson Barnett remained under said decree, or judgment, of incompetency, and while he was incapable of knowing and understanding the nature, effect, and purport of the said transactions, matters, and things herein alleged, and without notice to his said guardian, and without knowledge thereof, and the said County

Court, all of which was to all said persons and departmental officers well known and understood, the said Secretary Albert B. Fall and his duly authorized Assistant Secretary F. M. Goodwin, joined, concurred in, and recommended by the said Commissioner Charles H. Burke, did then and there cause to be assigned and delivered to said Anna Laura Lowe, in the name of Anna Laura Barnett, by the said Secretary and the said Assistant Secretary and the said Commissioner, of five hundred and fifty thousand dollars ($550,000.00), par and face value, of said bonds, as follows:

U. S. first Liberty loan bonds, #220	$50,000.00
U. S. second Liberty loan bonds, #6708 to #6711, inclusive, $10,000.00 each	40,000.00
U. S. second Liberty loan bonds, #683	50,000.00
156 U. S. third Liberty loan bonds, #1256	5,000.00
U. S. third Liberty loan bonds, #17824 to #17832, inclusive, $5,000.00 each	45,000.00
U. S. third Liberty loan bonds, #16228 to #16236, inclusive, $10,000.00 each	90,000.00
U. S. third Liberty loan bonds, #102	50,000.00
U. S. fourth Liberty loan bonds:	
#1572 and #1573, $100,000.00	200,000.00
#8721 and #8722, $10,000.00	20,000.00

and to the said A. J. Ward, five hundred and fifty thousand dollars ($550,000.00), par and face value, of said bonds, as follows:

U. S. first Liberty loan bond, #245	$100,000.00
U. S. second Liberty loan bond, #682	50,000.00
U. S. second Liberty loan bonds, #6705 and #6707, inclusive, $10,000.00 each	30,000.00
U. S. third Liberty loan bonds:	
#101 and #103, each $50,000.00	100,000.00
#16222 to #16227, inclusive, $10,000.00 each	60,000.00
#17813 to #17823, inclusive, $5,000.00 each	55,000.00
U. S. fourth Liberty loan bonds:	
#1574	100,000.00
#666	50,000.00
#9964	5,000.00

157 no part of which bonds have even been returned to the said Secretary of the Interior nor to any officer of the United States.

15. That as to whether said Secretary Albert B. Fall, Assistant Secretary F. M. Goodwin, Commisioner Charles H. Burke, and any others of said departmental officers participating in the promulgation of said amendment to said rule and regulation and in the granting of said pretended request of the said Jackson Barnett to make said pretended gifts, and participating in the assignment and delivery of said bonds as alleged, did so with a fraudulent purpose of aiding and assisting the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott in the accomplishment and consummation of their said plan, design, and scheme so to defraud the said Jackson Barnett and the said United States, intervenor is unable to aver, but intervenor does allege and aver that if not so thereby intended and done, and if not procured to be done thereby by the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott, with a fraudulent purpose and

intent, the said acts nevertheless were so done in a reckless and wanton disregard of the rights of said Jackson Barnett and of the rights of his said guardian and the rights and jurisdiction of the said County Court having jurisdiction over the person and over said property and the estate of said Jackson Barnett, as well as the rights of the United States in the premises, as well as in a reckless and wanton disregard of the duty of the United States
158 toward said Jackson Barnett and his estate and property as a ward of the Nation, and in a reckless and wanton disregard of its national duty thereto, and all in such manner as to constitute same a fraud in law and equity against both the said Jackson Barnett and the intervenor, the United States of America. That the said acts of said officials of the Interior Department were not only in excess of their statutory powers and authority but were an unwarranted, unauthorized, and arbitrary abuse of their limited discretionary powers, constituting in law and equity a fraud against both the said Jackson Barnett and the United States, of which said facts, matters, and things the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott at all times had notice.

16. Intervenor, however, alleges that the said representations so made by said Anna Laura Lowe, Harold C. McGugin, M. L. Mott, and A. J. Ward to the said Secretary Albert B. Fall, Assistant Secretary F. M. Goodwin, and Commissioner Charles H. Burke were false and at the time each thereof in making the same knew the same to be false and each made the same intending that said officers should believe, rely, and set thereon, said representations being false in that the pretended marriage between the said Jackson Barnett and said Anna Laura Lowe was a nullity by reason of the said incompetency and want of capacity of said Jackson Barnett to enter into a marriage contract; and because the said Jackson Barnett was abducted and caused to submit to said pretended marriage ceremony through fraud, coercion, undue influence, du-
159 ress, and force of the said Anna Laura Lowe, all overcoming his weak mentality, as hereinbefore alleged; and because the said pretended marriage was intended as a fraud and was a fraud against the said Jackson Barnett and the said County Court and said Carl J. O'Hornett, guardian, and the United States with respect to its governmental control of each over said Jackson Barnett and his property; that said representations were further false in that the said Jackson Barnett did then have a living relative, to wit, one David Barnett, a half brother; in that under the law of Oklahoma the fact of marriage did not operate to vest an undivided half or any other interest of the husband's property in the wife, nor to terminate the authority of a guardian over an incompetent person; in that the said Jackson Barnett did not know, understand, or comprehend the character, nature, or import of the said purported written request to the said Secretary to make

the proposed gifts of his property, nor the purported trust created by said Anna Laura Lowe under her assumed name of Barnett, did not know and understand that he was making a gift and disposing of his property; all of which representations, the United States alleges, but not on knowledge, but on assumption based upon the presumption of law that officers act honestly and in good faith, were at all times believed, relied, and acted upon by said departmental officers, although there was since March 2, 1922, on file in the office of said Secretary Albert B. Fall and Commissioner Charles H. Burke a voluminous official written report of the special supervisor of said department, made on April 28, 1920, to and
160 at the request of Cato Sells, the then Commissioner of Indian Affairs, which report, based on a personal investigation of said supervisor, disclosed that said Anna Laura Lowe for some ten years prior was a notorious character, of bad repute, engaging in adulterous relations in hotels in many cities in many States, as well as having the reputation of blackmailing men with whom she would so engage, said report further detailing the facts with reference to her kidnapping and marrying said Jackson Barnett, as are set forth in this petition, and further detailing activities of said Anna Laura Lowe immediately prior to her said pretended marriage, showing the same to have been intentionally brought about and procured for the purpose of defrauding the said Jackson Barnett and the United States, the fact of which report being so on file in said office and the contents thereof, intervenor assumes, was not brought to the attention of said Secretary Albert B. Fall, Assistant Secretary F. M. Goodwin, and Commissioner Charles H. Burke. However, intervenor, the United States of America, in the alternative, avers and alleges that if in any wise mistaken in its said assumptions and in the said averments thereon based, then that the said Albert B. Fall, the then said Secretary of the Interior, Assistant Secretary F. M. Goodwin, and Commissioner Charles H. Burke, in their several acts in the promulgation of said amendment to said rule and regulation and in the approval and the granting of the said pretended request of said Jackson Barnett to make said gifts and in their said acts in delivering and surrendering said bonds to the said Anna Laura Lowe and to the said A. J.
161 Ward, did so with the purpose of aiding, assisting, and abetting the said Anna Laura Lowe, said Harold C. McGugin, A. J. Ward, and M. L. Mott in the accomplishment of the said purpose, plan, and design to defraud the said Jackson Barnett out of the same and to defraud the United States of America in its governmental capacity, right, and duty in respect to the said Jackson Barnett, his person and his said property, all as hereinbefore alleged, all thereof so done in the face of the fact that under the management, direction, and control of the said guardian, Carl J. O'Hornett, and the said County Court, the said one million and one hundred thousand dollars ($1,100,000.00) had accumulated from said rents and royalties under said oil lease, and under the joint supervision

and control of said County Court and said guardian, the same had been preserved until so unlawfully and wrongfully diverted and converted by said departmental officers. That of the said bonds so delivered to said Anna Laura Lowe by said Secretary Albert B. Fall and his said subordinate departmental officials, the said Anna Laura Lowe did immediately thereupon and in fulfillment of the terms and conditions of said fraudulent agreement and conspiracies as herein alleged, assign and deliver to said Harold C. McGugin, or for his use and benefit and as his portion of the fruits of said fraud and conspiracy, one hundred and fifty thousand dollars ($150,000.00) par of said bonds, or the converted form thereof, and did deliver, or cause to be delivered, to said M. L. Mott fifteen thousand dollars ($15,000.00) par thereof, or the converted form of same, as his portion of said fruits of said fraud, and further and on said

162 day and without consideration and with full notice of the facts as to the delivery of said bonds, delivered to said Walter S. Keith thirty thousand dollars ($30,000.00) par of said bonds.

17. That immediately thereupon the said Anna Laura Barnett, under a purported trust agreement between herself and the Riggs National Bank, and concurred in and approved by said Secretary Albert B. Fall, Assistant Secretary F. M. Goodwin, and Commissioner Burke, and with full knowledge on the part of each thereof and of the said M. L. Mott and A. J. Ward, assigned and delivered to said bank two hundred thousand dollars ($200,000.00) of said bonds, and also under a purported trust agreement caused by her to be entered into between defendant The American Baptist Home Mission Society and defendant The Equitable Trust Company of New York, and under an agreement entered into between herself and said departmental officers, aided and abetted therein by said McGugin, Mott, and Ward, in furtherance of said fraudulent design, did cause the said five hundred and fifty thousand dollars ($550,000.00), par, bonds so delivered to said A. J. Ward, as hereinbefore alleged, to be delivered thereby to said American Baptist Home Mission Society, and thereby to the said defendant The Equitable Trust Company, for the purposes of said pretended trust, whereunder and of the income from said bonds a portion of said income during the life of said Jackson Barnett should be paid to the said Jackson Barnett and upon his death the said bonds to be delivered to and to become the property of said defendant The American Baptist Home Mission Society.

163 18. That in furtherance of the unlawful design and plan hereinbefore alleged, the said Anna Laura Barnett, aided and assisted by her said named associates, and with the fraudulent intent on the part of each thereof of impeding, interfering with, and defeating the United States in its governmental control and capacity, as hereinbefore alleged, and of impeding, impairing, and defeating the jurisdiction of said County Court of Okmulgee County and the said guardian thereby appointed, did cause and procure said Jackson

Barnett soon after the receipt of said bonds from said Secretary of the Interior, as alleged, to be taken to the State of California and there at all times detained in his incompetency and helpless condition and away from his friends and old associates and those calculated to protect his interests, and in furtherance of said plan did procure the appointment of the said Anna Laura Lowe as guardian of the person of said Jackson Barnett and the Security Trust and Savings Bank of Los Angeles as guardian of his estate, all by the Superior Court of Los Angeles County, California, on an application therein filed by said Anna Laura Barnett about July 22, 1924, wherein she represented said Jackson Barnett to be an incompetent, incapable of caring for his person and business, and praying the appointment of a guardian of his person and estate, in which proceeding and on which petition said court on July 29, 1924, did appoint said Anna Laura Barnett guardian of the person, and said Security Trust and Savings Bank guardian of the estate, of said Jackson Barnett, which said bank continued in said capacity until resigning its trust
164 on March 6, 1925, after which said court appointed, at the request of said Anna Laura Barnett, one Leslie R. Hewitt as guardian of the estate of said Jackson Barnett.

19. That in order to accomplish said purpose and to procure the appointment of said guardian, and further to effectuate said fraudulent design, the said M. L. Mott and A. J. Ward not only aided and assisted said Anna Laura Barnett in the preparation of her plans to cause said Jackson Barnett so to be removed from the jurisdiction of said Oklahoma courts, but said M. L. Mott did after the removal thereof go to the State of California and there aid, abet, and assist said Anna Laura Barnett by counsel and advice thereto in procuring the appointment of said guardian in California and thereby if possible to place the person and estate of said Jackson Barnett under the jurisdiction of the California Courts, and thus deprive said Okmulgee County Court of its further jurisdiction, and to defeat the purpose of the acts of Congress in creating and recognizing said County Courts in the said respects as having exclusive jurisdiction of incompetent and minor members of the Creek Tribe of Indians under the acts of Congress and the laws of the State of Oklahoma; that prior thereto said Mott, Ward, and McGugin, in furtherance of said fraudulent plan and agreement and for the purpose of causing all funds of said Jackson Barnett to be removed from the jurisdiction of Oklahoma, did induce, aid, advise, and assist said Anna Laura Barnett and said departmental officers to remove, and in the removal of the funds and property of said Jackson Barnett
165 then in the hands of the Superintendent of the Five Civilized Tribes of Oklahoma, to and into the custody and possession of said Secretary of the Interior at Washington, D. C.

20. After having so fraudulently invoked the jurisdiction of the Superior Court of California, as alleged, and after the procurement of the appointment of said Security Trust and Savings Bank as guardian of the estate of Jackson Barnett, the said Anna Laura Lowe,

in furtherance of said unlawful and fraudulent design and plan, aided and assisted by the said M. L. Mott, A. J. Ward, and Harold C. McGugin, and without the knowledge of said Oklahoma guardian and said County Court, did no October 8, 1924, procure a transfer of fifty-five thousand dollars ($55,000.00), par, of bonds, of said Jackson Barnett then in the hands of said Secretary of the Interior and so thereto transferred, to be by said departmental officers transmitted to said State of California to said Security Trust and Savings Bank of Los Angeles, and thereby received on November 7, 1924, and by said bank converted into cash, the said Anna Laura Barnett thereafter and within a period of some seventy (70) days, having obtained under said pretended guardianship proceedings for her own use and benefit in excess of twenty-four thousand dollars ($24,000.00) of said amount so transmitted, all of which she had at all times retained; that in addition in the same manner and by the same parties twenty-five thousand dollars ($25,000.00) additional funds and bonds were procured to be transferred from said Secretary of the Interior
166 to the said Leslie R. Hewitt on or about the twenty-eighth day of July, 1926, all thereof being done by the said-named parties and departmental officers with full knowledge of all the facts, matters, and things hereinbefore alleged and of the said fraudulent purpose, plan, and design, all of which acts of said departmental officers were without authority of law, contrary to law and in excess of the powers and authority thereof, all in the manner as in this petition alleged.

21. That no part of said funds, money, bonds, or income has been returned to said Secretary of the Interior, and particularly no part of said five hundred and fifty thousand dollars ($550,000.00) of bonds have been returned by said American Baptist Home Mission Society or by said Equitable Trust Company of New York, defendants herein, and all thereof have at all times since been retained and are now retained thereby and in the possession thereof, each of whom having refused to return any part or portion thereof to the said Secretary of the Interior. Intervenor alleges that a number of said bonds, if not all thereof, delivered to defendants herein, show a receipt upno their face that same were issued to the Secretary of the Interior for the use of Jackson Barnett as an incompetent expressly so designating his incompetency on the face thereof, and all of the officers and agents of said defendants at all times well knew and understood that said Jackson Barnett was in fact an incompetent as well as by judicial determination and incapable of acting in the premises by reason thereof; that all of said matters, things, acts, and transactions complained of were unlawful, null, and void,
167 and all thereof done and performed in furtherance of said original plan, design, and scheme to defraud not only said Jackson Barnett but the United States, all as in the manner alleged.

Intervenor avers that it is entited to an accounting herein as against said defendants and entitled to a decree in this court decreeing said pretended trust agreement to be wholly null, void, and of

no effect, and entitled to a decree of this court impressing a trust upon all of the property so in the hands of defendants or either thereof accruing by, through, or under said pretended trust, together with the income therefrom for the use and benefit of said Jackson Barnett, and a decree requiring the surrender and return thereof to the Secretary of the Interior to be by him held and retained as in manner by law required.

For as much, therefore, as intervenor is without adequate remedy at law and can have relief only in a court of equity where matters of this kind are cognizable, it prays:

First. That defendants and each thereof be required to answer this petition of intervention, but not under oath, answer under oath being expressly waived.

Second. That defendants each be required to answer herein, disclosing fully by description, number, and amounts the said United States Liberty bonds, respectively, received by it under said pretended trust agreement, and further showing by specific description any securities or property into which the same or any part of said bonds have been converted, if at all, and fully and in all
168 respects to account for the income therefrom, and that the court herein decree that all thereof to be the property of said Jackson Barnett, and that the pretended title of the defendants therein be decreed to be in trust for the use and benefit of said Jackson Barnett, and that the same be by decree of this court required to pay and deliver to the said Secretary of the Interior to be by him retained and held to be disposed of only in manner as by law provided.

That said pretended declaration of trust so entered into between defendants and all agreements between either of defendants and said Anna Laura Lowe, if any, with reference to said property so involved in said trust agreement, be adjudged and decreed to be null and void and the same set aside, canceled, and held for naught, and that all of said properties be adjudged and decreed to be the property of Jackson Barnett, and that the intervenor, United States of America, have all further, other, special, and general relief to which it is entitled under the circumstances and facts of this case as in equity and good conscience may seem just and proper.

JOHN G. SARGENT,
Attorney General of the United States.
By B. M. PARMENTER,
Assistant Attorney General.
By CHARLES B. SELBY,
Special Assistant to the Attorney General.
By EMORY R. BUCKNER,
United States Attorney for the Southern District of New York.

169 [*Duly sworn to by Charles B. Selby; jurat omitted in printing.*]

170 In United States District Court

Statement at trial withdrawing certain allegations

AMENDMENT MADE IN OPEN COURT TO THE AMENDED PETITION OF INTERVENTION OF THE UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

Mr. CRAWFORD. I desire to withdraw on behalf of the intervening petitioner, the United States, each and every allegation of the amended petition of intervention wherein it is alleged in substance or in effect that the then Secretary of the Interior, Albert B. Fall, and the then Commissioner of Indian Affairs, Charles H. Burke, willfully and knowingly cooperated with Anna Laura Lowe, Harold C. McGugin, A. J. Ward, and M. L. Mott in the accomplishment and consummation of their plan, design, scheme, and conspiracy to defraud Jackson Barnett and the United States; and each and every allegation in the said amended petition that the said Secretary of the Interior, Albert B. Fall, and the said Assistant Secretary, F. M. Goodwin, and the said Commissioner of Indian Affairs, Charles H. Burke, in promulgating the said amendment to Regulation No. 24, and in granting the pretended request of the said Jackson Barnett to make his pretended gifts, and in participating in the assignment of Liberty bonds of the said Jackson Barnett, all as appears more fully in the said amended petition of intervention, did so with the fraudulent and illegal purpose of aiding, abetting, and assisting the said Anna Laura Howe, Harold C. McGugin, A. J. Ward, and M. L. Mott in the accomplishment and consummation of the said plan, design, scheme, and conspiracy to defraud Jackson Barnett and the United States.

We wish to amend the amended petition of intervention by
171 withdrawing all of those allegation therein contained wherein it is alleged in substance or in effect that the amendment to Regulation No. 24 promulgated by the Secretary of the Interior, under acts of Congress approved April 24, 1906, May 27, 1908, and February 14, 1920, which said amendment was made and promulgated on the 7th day of October, 1922, was wholly void and without force and effect in that the same was not only not authorized by any act of Congress, but was contrary to the provisions and to the purpose and intent thereof, and that the making of such amendment was an unwarranted, unlawful, and arbitrary act and an abuse of the limited discretionary powers conferred upon the Secretary of the Interior by Congress and in excess of his power and authority to make.

172 In United States District Court

[Title omitted.]

Patterson, Eagle, Greenough & Day, solicitors for plaintiff (Carroll G. Walter and Rayburn L. Foster, and Cochran & Ellison and McCrory & Monk, of counsel).

Murray, Aldrich & Roberts, solicitors for the Equitable Trust Company of New York (A. M. Stackhouse, of counsel).

Charles S. Fettretch, solicitor for American Baptist Home Mission Society (Charles B. Rogers, Philip P. Campbell, and L. O. Lyttle, of counsel).

Emory R. Buckner, United States attorney, solicitor for intervenor (Thomas J. Crawford, Alvin McK. Sylvester, Charles B. Selby, and Nat. M. Lacy, of counsel).

Opinion of Knox, D. J., on final hearing

173 KNOX, D. J.:

For the purposes of this case, it may be assumed that the Secretary of the Interior had power and authority to remove the restrictions which the Congress of the United States has placed upon the property of Jackson Barnett, as a full blood Indian of the Creek tribe and to approve such gifts and donations of his property as he, in fact, made. But such approval, however honest and disinterested it may have been, can not give validity to a gift or donation which the apparent donor did not make, and which, by reason of mental incompetency, he was incapable of making. (Jennings v. Wood, 192 Fed. 507; Kendall v. Ewert, 259 U. S. 139.)

The record now before the Court is of great volume, and it would be a laborious task to summarize all the details of the amazing set of facts that seem to me to compel a conclusion that the instruments under attack should be set aside. By reason of this my recital of the matters by which I am convinced of Barnett's mental incompetency will be as brief as they can understandingly be stated.

Here is an illiterate Indian, now in the neighborhood of seventy-seven or seventy-eight years of age, who, until he became wealthy, was allowed to shift for himself and to eke out an existence as best he could. This he did in a more or less haphazard way until oil was found upon his allotment of land in Oklahoma. From that time until the present he has been the shuttledore in a game of battledore in which the stakes were high. Solicited and importuned for donations, to which he readily affixed his thumb print for
174 most anyone who asked it; kidnapped and married by an adventuress; harassed and annoyed by her attorneys and their allies, who enlisted the support of officials of the Government, and who were probably convinced of the justification of their subsequent action, he was finally induced to assent to part with Liberty bonds in the vast sum of eleven hundred thousand dollars. To the credit of the persons engaged in the transaction, it must be said that under the terms of the gifts thus made and the trust agreement executed provision was made for a substantial and sufficient life income to Barnett. But, even so, and admitting that the object of the trust created for Bacone University is a worthy one, and that Mrs. Barnett, so far as is known, has been a good wife to the Indian, the provisions for his support, which are contained in the several instruments of gifts and in the trusts, will not suffice to lend countenance to the ravishment of property rights that here occurred, nor warrant

officials of the Government in substituting their judgment for that which Barnett was unable to exercise.

The witness Mason, who testified to a conversation had with McGugin, the attorney for Mrs. Barnett, on an occasion in 1921, when he met him, Jackson Barnett, and his wife in an automobile, has been twice convicted for unlawful sales of whiskey, and is not friendly to McGugin. His evidence must, in consequence, be considered with these circumstances in mind. Nevertheless, a part of what he told was corroborated by subsequent events, and that was this:

"'I see,' said Mason, 'you are giving the old man a little air.' 'Yes,' replied McGugin, 'we are airing him out in the car; we are going to air him out of some money.'"

The prophecy came true in the consummation of the transactions now before the court. The extent of the "airing" was that Mrs. Barnett received Liberty bonds in the amount of $550,000, with a part of which she created a trust for Barnett and turned over to McGugin, as his portion of the distribution, bonds worth $125,000 or perhaps a larger sum. At the same time, and in an effort to make this transaction palatable, a deserving charity was remembered to the extent of $550,000. It is to this gift that the present suit relates.

In considering Barnett's mentality, it is pertinent to give some attention to his proclivity in making donations. In the files of the Department of the Interior there is an undated letter, thumb-marked by him, in which he donates $1,000,000 for a hospital in or near Henryetta, Oklahoma, $150,000 to be applied to the acquisition of land and the erection of buildings, the balance to be utilized for an endowment of the institution. Under date of February 11, 1920, Barnett authorized the following gifts to be made out of his restricted funds:

Indiana Orphan Home, at Bacone	$50,000
Orphans' Home, near Oklahoma City	50,000
M. E. Church, South Henryetta	25,000
Christian Church, Henryetta	25,000
Catholic Church, Henryetta	25,000
Nazarene Church, Henryetta	25,000
First Presbyterian Church, Henryetta	25,000
Episcopal Church, Henryetta	25,000
Silver Springs Indian Church	10,000
Indian church, near Holdenville	2,500
To the Baptist Church denomination for the work designated in the donation itself	200,000
	462,000

Jackson's thumbmark to these proposed gifts, together with one of $1,000,000 for the hospital, were obtained by a man named Casey at the suggestion of two others named Cameron and Burroughs, respectively. Casey accomplished his purpose as a result of having frequently gratified Barnett's taste for egg-malted milk and by telling him that his contribution was wanted to build a hospital. The paper was not read over to the Indian, and Casey justifies himself for not having done so by saying that Barnett could not have under-

stood it. Had these gifts been consummated, Casey, Burrough, and Cameron were to have received $105,000. In this connection, it is only just to say that Cato Sells, who first suggested that Barnett donate $1,000,000 for the purpose of building a hospital, was not to share in the commissions to which Casey testifies were to be paid. Mr. Sells was sincere in his desire that a hospital for Indians be erected, and believed himself to be warranted in having Barnett furnish the funds for doing so. The project, however, did not materialize. One reason was that within a week or two the present Mrs. Barnett, then Mrs. Lowe, appeared on the scene, and after several vicissitudes succeeded in carrying Barnett to Kansas, where they were married. To make assurance doubly sure that they were legally wedlocked, she then took him to Missouri, where a
177 second marriage ceremony was had. A few days after the first ceremony Barnett thumbmarked a letter, in which he rescinded the foregoing authorized gifts. He was then under the dominance of his wife and her attorney, McGugin. But some time afterwards, on December 18, 1920, Casey succeeded in getting Barnett into Cameron's office in Henryetta and had no difficulty whatever in having the Indian repudiate his rescission of the gifts proposed in the original Casey document and by a new authorization reinstate the same as an expression of his wishes and desires. The instrument last executed was sent by Cameron to the then Commissioner of Indian Affairs, but that official, although deeply interested in the hospital project, failed to approve the gifts, and they were not made.

Thus matters remained for a period of six months. Meanwhile, the administration of the National Government changed, and there was a new Commissioner of Indian Affairs and a new Secretary of the Interior, and in July of 1921 overtures for withdrawals of Barnett's money were made to them. Cameron, in company with a delegation of Baptist ministers and in possession of a letter of introduction from a man named Motter, a special assistant to the recently installed Attorney General of the United States, called on Indian Commissioner Burke, seeking his approval of the donation of $200,000 theretofore attempted to be made by Barnett. The solicitors for funds were requested to initiate the request through the office of Victor M. Locke, jr., who was then superintendent of the Five Civilized Tribes. Burke then wrote to Locke and said, inter alia:

178 "I take it for granted that one of the first steps would be to have it (the proposed donation) referred to Mr. A. J. Ward, the Creek tribal attorney, with a request that he express an opinion as to the legal questions that may be involved."

This course was pursued, and on September 24, 1921, Locke forwarded a memorandum prepared by his law clerk and another prepared by Ward. In the letter of transmittal Locke called attention to the fact that Barnett had been adjudged an incompetent by one of the courts of Oklahoma and that he had a guardian. The reports of his law clerk and that of Ward had dealt with the relationship

between the department and the probate courts of Oklahoma, and had recommended, in view of resulting questions of law and policy, that the gift be not approved. In this opinion Locke concurred. It was near this time that McGugin met the special assistant to the Attorney General, who had introduced Cameron to Burke. Very shortly thereafter a petition was prepared and sent to Burke, in which Barnett's Oklahoma guardian was taken to task for the niggardly and unsatisfactory manner in which he looked after the needs of the Barnett family. It was asked that the Indian and his wife, accompanied by Motter, should be permitted to go to Washington for a conference with the commissioner and that the sum of $2,500 be allowed for the purpose. The trip was promptly authorized. Difficulty, however, was experienced in securing the approval of Barnett's guardian and the county judge of Okmulgee County to sign a voucher for the expenses of the trip. The United
179 States probate attorney was brought into the situation, and he advised the commissioner of his belief that Barnett knew nothing of the petition, and that he had no desire to go to Washington, and that, in the attorney's opinion, the whole plan was a scheme of McGugin and Mrs. Barnett to get some of the Indian's money. Nevertheless, the county judge finally approved the voucher for the funds that had been requested, notifying the commissioner that he had done so in a spirit of desiring to cooperate with the department, but asking that he be advised of any proposed donations or investments of Barnett's funds that would require action by this court. It was not long before Motter, McGugin, and the Barnetts were in the anteroom leading to the office of Commissioner Burke. Coincident with their presence, M. L. Mott, former Creek attorney, an old acquaintance of Burke and favorably disposed towards donations by wealthy Indians to worthy charitable and educational objects, happend to be present. In fact, he testified he had expressed his views on this subject to the commissioner a day or two previous to the arrival of the party from Oklahoma. It likewise appears to be the fact that Mott suggested to Burke that if Motter should be interested in the affairs of the Barnetts an embarrassment, due to Motter's connection with the Department of Justice, might arise. Burke, thereafter, spoke to the special assistant to the Attorney General about this feature of the case and he, apparently, stepped out of the situation.

The Washington conference with the commissioner seems to have been confined to a general talk about the needs and desires of
180 the Barnetts with particular reference to the alleged obstacles that were being placed in their way by the unfriendly attitude of the Oklahoma guardian and the court which appointed him. Burke, however, did say that if Barnett made any disposition of his estate, it was his (Burke's) hope that it would be beneficial to his tribe. On the return trip to the west McGugin and Mott were on the same train, and they took occasion to discuss the affairs of Barnett. According to Mott, he said to McGugin:

"I don't think you are following the case in the right way; I think you ought to take the position that the probate court has no control whatever over the funds of a full-blood restricted Indian, whether he is competent or incompetent, if it is in the hands of the Secretary of the Interior * * *"

It seems that there was also some discussion about the possible creation of trusts of Barnett's property.

On September 28 Burke wrote to the superintendent of Five Civilized Tribes with reference to the Barnett case. After expressing his views as to how Indians should be protected from designing persons and commenting upon the luxuries to which Barnett was entitled as a man of wealth, he went on to say that Locke's suggestion with reference to Barnett's making a disposition of his estate so that the Creek Nation would be the beneficiary for educational purposes was one that would meet with his hearty approval. He also said that Barnett should make ample provision for his wife and any immediate relatives that he might have. And, further, that
181 it would be gratifying if he would recognize some local institutions if he were so disposed. Burke went on to state that he would, for the present, withhold his approval of the proposed donation of $200,000 to the Baptist Church fund which was urged by Rev. Cameron. From that time on until well into the following year there was a series of communications passing back and forth between Washington and the various governmental agencies in Oklahoma. These dealt particularly with the guardianship situation and the fact that considerable feeling had been aroused between the department and the Oklahoma Probate Court, which had resulted in considerable publicity.

In July of 1922 the disposition of $1,100,000 belonging to Barnett began to take definite form, especially after the Solicitor of the Interior Department had rendered an opinion to the Secretary as to the extent of the latter's authority over the restricted funds and property of full-blooded Indians. The opinion was that the Secretary might act independently of both the probate court and the guardian whom it had appointed of the property of Barnett, an incompetent restricted allottee, and that he, the Secretary, was not limited or restricted in the control or disbursement of restricted funds of individual Indians of the Five Civilized Tribes, nor could he be so restricted by the order of any probate court or by its failure or refusal to act in the premises.

Thereupon, the commissioner recommended that the rules that had long been in force with respect to the restricted property of full-blooded Indians be amended, and wrote to the Secretary in part as follows:

182 "It has been found that in some cases the payment to the guardians of restricted Indians of money out of the restricted funds of such Indians would not be to the best interest of the Indians. In view, therefore, of the above-mentioned approved opinion of

Solicitor for the Interior Department, I recommend that section 24 of the above-mentioned department regulations be amended by the addition to said Section 24 at the end thereof of the following paragraph:

"'And provided further, that any such individual cases or classes of cases as the Secretary of the Interior may direct the superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual funds of the restricted Indians, minors, and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases.'"

This proposed amendment was speedily adopted and became a part of the departmental rules and regulations.

In the latter part of November, 1922, McGugin, Ward, and Mott were again in Washington, and McGugin remained there until February of 1923. From time to time some negotiations were carried on with the department in respect to a purchase of a farm for the Barnetts near Coffeyville, Kansas. Nothing came of this project. But, according to McGugin, in one of his conversations with Burke the latter said:

183 "What would be the attitude of you, as attorney for Mrs. Barnett, toward a distribution of a part of this estate to some worthy charity, and taking care of Barnett, rendering him secure?"

In reply, McGugin said that Mrs. Barnett had never been adverse to a part of the estate going to such a charity, but it was her desire that whatever was given for that purpose should be for the benefit of the Indians, and that this was Barnett's desire as well as her own. McGugin went on to say to Burke that it had never been the desire of Mrs. Barnett or himself to try to "hog" the estate unreasonably, and that Mrs. Barnett should no have anything except what was a fair share. Further, he called attention to the fact that Barnett had already made two wills in which he had made liberal provision for Indian charities. McGugin informed the commissioner that Mrs. Barnett would be opposed to any gifts to take effect during the lifetime of Barnett unless, at the same time, she was made a gift in some reasonable amount. The commissioner said that the restrictions by which Barnett's property was burdened would probably be released in 1931, and if the Creek died before that year there would be endless litigation concerning his estate, and that, 'herefore, he would like to see at least a part of his property placed where it would be of lasting benefit to the Indians. He went on to say that if some plans could be worked out in figures which would be satisfactory to the department and which met with the wishes of Barnett he was willing and ready for the department to make some distribu-

184 tions from the estate. At this, McGugin and Ward went into an anteroom and talked over the details of distribution as should be made. Ward, it appears, called attention to the fact that

several Indians had made gifts to Bacone College, which was under the jurisdiction of the American Baptist Home Mission Society, McGugin observed that while he had never talked about such a matter with Jackson and his wife other than upon the occasion when he drew the Indian's will, he had no doubt that Bacone University would be a desirable agency to receive the money and to distribute it for the benefit of the Indians. It is probable that at this conference the amounts to be distributed out of Jackson Barnett's funds were first seriously discussed, Ward proposing that the school be given $700,000 and that Mrs. Barnett receive $400,000. This division of the funds did not appeal to McGugin as being a suitable provision for Mrs. Barnett. Nevertheless, then, and at later times, Ward insisted that the division should be $700,000 to the school and $400,000 for Mrs. Barnett, giving McGugin to understand that these figures would meet with the approval of the department and that it would not approve anything else.

So matters continued, and McGugin had with reluctance about reached the conclusion to accede to Ward's position. But, before doing so he again came into contact with Mott, to whom he related the status of the pending negotiations. Mott made the suggestion that the department was in mighty poor business in giving the woman any money except such an amount as she would inherit if Barnett died without a will. He proceeded to state that—

185 "The department has recognized that woman as the dutiful wife of Jackson Barnett, and there are no circumstances justifying or excusing them from even giving her a penny less than one-half—just what she would inherit if Jackson Barnett died intestate."

The matter had not been placed before the department in that light, but the following day McGugin hastened to do so. He conferred with both Burke and Ward, with the result that they went into conference, and at its conclusion McGugin was advised that the department would not be adverse to placing its approval upon a distribution of one-half of the Indian's estate for the benefit of Mrs. Barnett and one-half for the benefit of Bacone University, provided such plan met with the sanction of Mr. and Mrs. Barnett and if the details could otherwise be satisfactorily worked out. McGugin lost little time in wiring to the Barnetts to come to Washington.

In passing it is to be observed that so far this plan had not been suggested to the man whose funds were thus to be distributed.

McGugin was well satisfied with the successful outcome of his negotiations at the department, and that night he again saw Mott. So happy was he at what had transpired that he voluntarily picked up a piece of paper on which he inscribed the following:

"Whereas there is under consideration in the Department of the Interior the possibility of my husband giving me $550,000, and such gift being approved by the Department of the Interior, as
186 and when that gift is consummated, if consummated, I agree to give to M. L. Mott, $15,000."

He signed it "Anna Laura Barnett, by Harold McGugin." The paper was given Mott, and when Mrs. Barnett received her bonds and had transferred a part of them to McGugin in payment of his fee he discharged the obligation of $15,000 he had given to Mott.

In compliance with the request contained in McGugin's telegram, Barnett and his wife, accompanied by a man named Keith, went to Washington, and on December 15, 1922, Jackson Barnett placed his thumb mark on the authorization that resulted in the instrument that plaintiff seeks by this suit to set aside. It is unnecessary, I think, to cite all the details that led to the final execution of the formal instrument, but for a moment let some inquiry be made as to the extent of Barnett's knowledge of what was going on.

He received no information from either Mott or McGugin. There is no evidence that Burke gave him an explanation of what was in prospect or of what the result would be. If Mrs. Barnett took up the matter with her husband, the record is barren of proof of the fact, for she did not choose to testify. The work of informing Barnett seems to have been left to Ward. He said he had three or four conversations of fifteen to thirty minutes each with Barnett about the proposed gifts. The talks were had in English, and the most definite statement of Barnett's understanding of the matter that the witness was able to give was that when he signed the instrument, and that he asked Barnett:

187 "'Now, Jack, I would like to know what your understanding of this is,' and he says, 'My wife he get half, and the Bacone School get half.' 'Well,' continued Ward, 'Is that all?' 'Well,' said Barnett, 'I get money as long as I live.'"

Previous discussions of the subject were, to use Ward's words, "monosyllabic." In the manner described a king's ransom was transferred from its rightful owner to the donees under the documents that now engage the attention of the court.

In addition to the revelation of Barnett's mental capacity as revealed by what has already been said, the record contains a considerable quantity of testimony given by various witnesses who have known the Indian for a number of years and who have formed opinions as to his intelligence and mental competence as a result of their contacts with him. The evidence given by these witnesses is in conflict; those of the plaintiff declare Barnett's incompetency and those of the defendants believe him to have been fully capable of understanding the effect and purport of the instrument to which he affixed his thumb mark.

At the trial none of the litigants saw fit to call Barnett as a witness. Being desirous of forming some judgment of his mental capacity from my interrogation of him, I called him to the stand. At the time of doing so each litigant conceded upon the record that the Indian did not understand the nature of an oath. He was, therefore, not sworn.

From his answers to the questions put to him I gained a distinct impression that he is a harmless, kindly, mentally undeveloped

188 man who was extremely bored at the court proceedings and had no comprehension of their significance. He was able to impart information as to where he lived, as to the number and type of his automobiles, and that he was possessed of several cow ponies. He knew how long he had been in New York in connection with the trial, gave the name of the hotel at which he was stopping, and expressed some idea of the location of one of the restaurants at which he procured his meals. He was aware, too, of his ownership of a farm of about seventy acres, and that he had another piece of property on which there was an oil well. Also, that money came to him from the oil well, but he did not know the amount of his income. When asked if he had any idea of a million dollars, he answered, "No." Nor could he tell what might be done with that sum of money. Being interrogated concerning schools in Oklahoma, he replied:

"Yes; there are lots of them out there * * * there is a blind school out there, and some Bacone School."

When asked what he liked about Bacone School, he said he did not know. He could remember having been to the school, which had a lot of buildings and where there were a good many Indians. He was then asked if he wished to do something for Bacone School, and his answer was:

"I don't know. When I die; I ain't dead yet."

At this point it is well to quote the questions propounded by the court, together with the answers made by the Indian:

189 "Q. What do you want to do with that school when you die?

"A. Well, they say they are going to let them have the money.

"Q. That is what who said?

"A. McGugin.

"Q. To let them have the money when you die?

"A. Yes.

"Q. And what about the money while you are alive?

"A. I am going to keep it and eat off it.

"Q. What was that?

"A. I am going to keep it and eat off it all the time while I live.

"Q. Do you know where that money is now?

"A. No.

"Q. Did you ever make a gift to this school, sign any papers about the school, giving them the money after you died?

"A. I do not know.

"Q. Do you remember having signed any papers?

"A. I do not know.

"Q. Well, would you like to give some money to some school here in New York for children?

"A. I do not know.

"Q. Well, if there was a good school here in New York to take care of poor children?

"A. Yes.

"Q. Would you like to help that school?

"A. I do not know.

"Q. Would you like to do something for some hospital here in New York where they take care of poor children? Would you like to give some of your money when you die to some school or hospital here in New York?

"A. Nodding affirmatively.

"Q. You would?

"A. Yes; when I die.

"Q. Do you like children?

"A. Yes.

"Q. Do you want to do something for Indian children?

"A. What?

190 "Q. Do you want to do something for Indian children?

"A. When I die that is what they say.

"Q. What was that, when you die they say?

"A. Yes.

"Q. Would you like to do something for Indian children now if you did not need all your money; would you like to give some of your money to help Indian children?

"A. I do not know."

On further examination, the witness recalled both Commissioner Burke and his predecessor, Commissioner Sells. He could remember that he saw the latter in Muskogee, and later in Washington and that Sells wished him to give money to a hospital. He was asked what Sells said to him about a hospital and his answer was:

"He said I ought to put up a hospital out there, and I told him no."

He said he thought Sells asked for about a million dollars and that he would have put it up but that there was not so much sickness at that time. He disclaims ever having told Sells that he would build a hospital and by a negative nod answered that he did not put his thumbmark on a paper for the erection of a hospital. When asked as to what McGugin said about Bacone School, he said:

"Well, nothing. He said when I die I am leaving to the Bacone School children to have the money."

Barnett was then asked what he said. The reply was:

191 "I told him I think I will go ahead and come back, and asked him the same thing, and when I died I could not have nobody; I would have to let him take it up when I died."

Asked if he had ever been in court, he said, "No," but he remembered having talked to a judge in Coffeyville. He said that he had never spoken to any other judge, and at the present examination declared that he did not know that he was talking to a judge. He recalled certain persons who visited him in California some time prior to the trial and could remember his marriage. When dependent upon his own resources, he had been able to save about 100, and stated that he had owned some horses and a cow and chickens,

together with some beef cattle which he sold. He was able to tell what it cost to stay at his hotel in New York and to give some idea as to the purchase price of his clothes. Also, that his house and farm cost about $30,000. He did not know, however, whether it would cost one thousand dollars to go from New York to his home in Los Angeles. When asked if he knew how much money would go to Bacone School from his gift to that institution, he answered:

"Well, I do not know; I have to use that money to eat. I am living yet."

When asked if he knew how much money Bacone School would get after his death, he replied:

"Well, yes; but they are not getting that while I am living yet."

He then said that he did not know what the amount would be.

This inquiry was then made:

192 "Well, can you not tell me anything like what it would be?"

He answered:

"I do not know. About fifty or twenty-five."

When inquiry was made as to whether he knew the difference between $100 and a thousand dollars, he said, "Yes," and answered that "$1,000 was more than a hundred and that a hundred is not quite a thousand." He could not tell, however, how far short of $1,000 a hundred dollars is. He also knew that $100,000 is a larger sum than $1,000. He believed that $7,500 is a greater sum than $100,000, but could not tell whether $500,000 was more than $100,000. As to his talks with McGugin in Washington, the witness declared that he did not say anything, and then added:

"I told him that I would not like to have Bacone School. When I died I would let them have the rest of the money."

When asked if his wife was to receive any money, he said:

"No; never figured on her."

He said that he did not talk to Ward about Bacone School. Asked as to the amount of money he would like to have to eat with and for his own use over the period of a year, he said he did not know, but finally added, in answer to questions, that $50 would not be enough and did not know if $1,000 would be sufficient.

193 He remembers having given some money to a Baptist church in Henryetta, but could not tell the amount. Outside of some details as to his immediate personal desires and wants, he was unable to express any intelligent conception of what had been done with his property or of what action he had taken in connection with it.

From all the evidence in the case, I am strongly of the opinion that the gifts which purport to have been made by Barnett can not be regarded as his acts and deeds, and must be held to be void and of no effect. The alleged donor had no real comprehension and understanding of what he was induced to do, and thus was without that clear and unmistakable intention to part with his property which is, as I understand the law, an essential requisite of a gift

inter vivos. (Snavely v. Henderson, 204 Fed. 978, and cases cited in 28 C. J. 627.) It is impossible for me to think that Barnett had any more appreciation or concern for the welfare of Bacone University than was felt by someone of his ancestors who passed to "the happy hunting grounds" of legend long before he was born. That he knew the value and extent of his property, or conceived the nature of the provisions for himself in the trusts that were created, appeals to me as incredible. While he is not insane and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing. In consequence of this, and as stated at the outset, there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity. Whatever may have been his authority to release restrictions upon Barnett's property, and admitting the hon-
194 esty of his belief and that of his subordinates that the arrangements made were for the Indian's benefit, he was without authority, as were Burke, McGugin, Ward, and Mrs. Barnett, to appropriate and give away property to which they had neither title nor power of disposition.

As the instrument under which Barnett's funds were removed from the custody of the Secretary of the Interior was and is invalid, the defendants, both of which were put on notice of the Indian's incompetency and the gifts having been without consideration, can take no property or beneficial interest therein, and must be found to hold the same, together with the interest thereon, for the benefit of the rightful owner of the property. Each of the defendants will be required to account for their possession and control of the property, its income and proceeds that came into their hands, and to turn over the whole thereof to the Secretary of the Interior to be held by him as property of the said Jackson Barnett under and pursuant to the acts of Congress relating thereto.

Since this case was tried, the appointment of Elmer S. Bailey as guardian of the estate of Barnett, heretofore made by one of the courts of Oklahoma, has been set aside, but without an adjudication that he is or was competent at the time of the appointment. Such fact does not impair the right of plaintiff, as prochein ami, of Barnett to maintain this suit. In any event, the United States, as intervenor, may have the relief which will be accorded by the decree. The question of the right of the United States to be here as intervenor has been previously passed upon and will not again be considered by this court.

195 In conclusion, and as bearing upon Barnett's competency, it is fitting to observe that shortly after the gifts with which this opinion has dealt he was, at the instance of his wife, declared to be incompetent by a court of California, and guardians of the person and estate were there appointed. In view, however, of the fact that the property of Barnett in the hands of the present defendants should not have been removed from the custody of the Secretary of

the Interior under the circumstances then presented to him, I think the same should be returned to the custody of that official, and there is no necessity to deal with the question of the relative rights thereto of the Secretary and the guardian of Barnett, who may at any time have been appointed by either of the States of Oklahoma and California.

August 9, 1927.

JNO. C. KNOX, *U. S. D. J.*

196 In United States District Court

JACKSON BARNETT, A MENTAL INCOMPETENT, BY ELMER S. Bailey, his prochein ami, plaintiff
AGAINST
THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE American Baptist Home Mission Society, defendants. E-31/91
UNITED STATES OF AMERICA, INTERVENOR

Final decree

November 21, 1927

This cause regularly came on to be heard and was tried on the 16th, 17th, 18th, 19th, 22nd, 23rd, and 24th days of November, 1926, and was argued by counsel; and the court having delivered its opinion on August 9, 1927, holding that the defendants can take no property
or beneficial interest in the bonds transferred to them as set
197 forth in the pleadings herein, and must be found to hold the same, together with the interest thereon, for the benefit of the rightful owner thereof, and requiring the defendants to account for their possession and control of the property, its income, and proceeds, and the defendant trust company having thereafter filed its account as required by said opinion, and the parties having agreed to accept said account without having the cause referred to a master and the account taken and stated by him;

Now, upon consideration thereof, it is ordered, adjudged and decreed as follows:

1. That the gift, transfer and assignment to the defendants of the $550,000 par value of United States Liberty loan bonds set forth in the pleadings herein, and the trust agreements therein set forth with respect thereto, be and the same hereby are declared to be null and void, and such transfer, gift, and assignment and such trust agreements are hereby set aside, and said bonds and the income and proceeds thereof are hereby declared to be the property of Jackson Barnett, to be held by the Secretary of the Interior of the United States for him under and pursuant to the acts of Congress relating thereto, and the defendants are found and adjudged to have no property or beneficial interest therein.

2. That the defendant The Equitable Trust Company of New York be and it is hereby directed, subject to the next succeeding paragraph hereof, to transfer and deliver to the Secretary of the Interior of the United States, to be held by him as property of the said Jackson Barnett under and pursuant to the acts of Congress
198 relating thereto, the following described property, which appears from its said account to be now in its possession, to wit:

$155,000 par value United States of America 4th Liberty loan 4¼'s, due October 15, 1938;

$100,000 par value United States of America 1st Liberty loan 3½'s, due June 15, 1947;

$80,000 par value United States of America 2nd Liberty loan converted 4½'s (exchanged for 2nd 4's originally received);

$216,000 par value United States Government 4's, due December 15, 1954;

$108,000 par value United States of America Treasury notes 4½'s, due December 15, 1927;

$777.27 in cash,

That the account heretofore filed with this court by the defendant The Equitable Trust Company of New York, be and the same hereby is approved and that upon the transfer and delivery of the above-described property to the Secretary of the Interior of the United States, to be held by him as property of Jackson Barnett under and pursuant to the act of Congress relating thereto, the defendant The Equitable Trust Company of New York, shall be discharged from all duty, responsibility, accountability and liability under the agreement executed by the Baptist Home Mission Society to the Equitable Trust Company of New York and dated February 1, 1923, and with respect to the property received by it thereunder, the income and proceeds thereof.

199 3. This court hereby retains jurisdiction of this cause and of the property above described for the purpose of hereafter entertaining and deciding applications by counsel for the plaintiff and counsel for the defendants for allowances out of said property for their services and disbursements, which applications are hereby authorized to be made within twenty days after the expiration of three months after the entry of this decree if no appeal from this decree be taken within said three months or within twenty days after the return to this court of the mandate of the appellate court (or other order finally disposing of such appeal) if this decree be appealed from, or within such further time as this court hereafter by subsequent order herein may allow; and for the purpose of hearing and determining such application the present term of this court is hereby extended until such determination is made; and execution of the next preceding paragraph of this decree is hereby stayed and compliance therewith enjoyed until such applications are finally determined.

JNO. C. KNOX, *U. S. D. J.*

200 In United States District Court

[Title omitted.]

Order as to application for allowance

Mar. 7, 1928

On the annexed affidavit of Edward J. Patterson, verified the 7th day of March, 1928, and on the annexed consent of Charles H. Tuttle, United States attorney, solicitor for the United States of America, it is

Ordered that the applications of counsel for allowances for services and disbursements out of the property mentioned and described in the decree dated and entered herein the 21st day of Novem-
201 ber, 1927, may be made within twenty days after the entry of an order by the Circuit Court of Appeals for the Second Circuit upon a motion to be made in said court, returnable the 19th day of March, 1928, to dismiss the appeal to said court taken by the defendant The American Baptist Home Mission Society, and in any event said applications may be made on or before the 2d day of April, 1928; and this court hereby retains jurisdiction of this cause and of the property described in said decree for the purpose of entertaining and deciding applications, and for such purpose the term of this court at which said decree was rendered is hereby further extended until such determination is made; and execution of paragraph 2 of said decree is hereby stayed and compliance therewith enjoined until such applications are finally determined.

The extensions and stay hereby granted are in addition to and not in limitation of the provisions of paragraph 3 of said decree, all of which shall remain in full force and effect.

JNO. C. KNOX, *U. S. D. J.*

202 In United States District Court

[Title omitted.]

Order as to applications for allowances

Mar. 28, 1928

Upon the annexed affidavit of Carroll G. Walter, verified March 27, 1928, and the subjoined consent of Charles H. Tuttle, United States attorney, solicitor for the United States of America, it is

Ordered that applications for allowances pursuant to paragraph 3 of the decree of November 21, 1927, herein may be made
203 within twenty days after the entry of an order of the Circuit Court of Appeals for the Second Circuit upon the motion now set for hearing in said court on April 9, 1928, to dismiss the ap-

peal to said court taken by the defendant mission society or within twenty days after said appeal is otherwise dismissed or disposed of or remains inoperative or of no effect; and this court hereby retains jurisdiction of this cause and of the property described in said decree for the purpose of entertaining and deciding such applications, and for such purpose the term of this court at which said decree was rendered is hereby further extended until such determination is made; and execution of paragraph 2 of said decree is hereby stayed and compliance therewith enjoined until such applications are finally determined.

The extensions and stay hereby granted are in addition to and not in limitation of the provisions of paragraph 3 of said decree, all of which shall remain in full force and effect.

JNO. C. KNOX, *U. S. D. J.*

I hereby consent to the entry of the foregoing order.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America.

204 In United States District Court

[Title omitted.]

Order as to applications for allowances

May 25, 1928

Upon the annexed affidavit of Carroll G. Walter, verified May 24, 1928, and the subjoined consent of Charles H. Tuttle, United States attorney, solicitor for United States of America, it is

Ordered that applications for allowances pursuant to paragraph 3 of the decree of the November 21, 1927, herein may be made within twenty days after the expiration of the time limited by law
205 for the filing of a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit dismissing the appeal of the defendant mission society from the said decree if no such petition be filed within the time limited therefor, or within twenty days after the denial of a petition for such a writ of certiorari if such petition be filed and denied, or within twenty days after the issuance of the mandate of the Supreme Court of the United States upon such writ of certiorari if a petition therefor be filed and granted, or within such further time as this court hereafter by subsequent order herein may allow; and this court hereby retains jurisdiction of this cause and of the property described in said decree for the purpose of entertaining and deciding such applications, and for such purpose the term of this court at which said decree was rendered is hereby further extended until such determination is made; and execution of paragraph 2 of said

decree is hereby stayed and compliance therewith enjoined until such applications are finally determined.

The extensions and stay hereby granted are in addition to and not in limitation of the provisions of paragraph 3 of said decree, all of which shall remain in full force and effect.

JNO. C. KNOX, *U. S. D. J.*

I hereby consent to the entry of the foregoing order.
May 24, 1928.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America.

206 In United States District Court

[Title omitted.]

Notice of motion for allowance to prochein ami

Please take notice that upon all the pleadings and proceedings heretofore had herein, including the affidavits submitted upon an application by counsel for the plaintiff made simultaneously herewith for an allowance to themselves for their services and disbursements, Elmer S. Bailey, the prochein ami herein, will move the court above named at a stated term thereof for the hearing of motions to be held at the Old Post Office Building, Borough of Manhattan, city, county, State, and Southern District of New York, on November 9, 1928, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an allowance to himself for his services as prochein ami herein.

Dated November 7, 1928.

ELMER S. BAILEY,
Prochein Ami.

207 To CHARLES H. TUTTLE, Esq.,
United States Attorney,
Solicitor for United States of America.

Due and timely service of the foregoing notice of motion is hereby admitted.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America, Intervenor.

208 In United States District Court

[Title omitted.]

Notice of motion for allowance to plaintiff's counsel

Please take notice that upon the annexed affidavit of Carroll G. Walter, verified October 31, 1928, and the annexed affidavits of Ray-

burn L. Foster and Almond D. Cochran, verified August 24, 1927, and upon all the pleadings and proceedings heretofore had herein, and pursuant to paragraph 3 of the decree of this court herein dated November 21, 1927, and the subsequent orders extending the time therefor, the undersigned Edward J. Patterson, J. Frederick Eagle, William Greenough, Sherman Day, Carroll G. Walter, and Dodge L. Marks, composing the firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, composing the firm of Hummer & Foster; Almond D. Cochran, surviving partner of the firm of Cochran & Ellison; C. B. McCrory and Dudley
209 C. Monk, co-partners composing the firm of McCrory & Monk, who collectively compose the solicitors and counsel for the plaintiff herein, will move the court above named at a stated term thereof for the hearing of motions, to be held at the Old Post Office Building, Borough of Manhattan, city, county, State, and Southern District of New York, on November 9, 1928, at 10.30 a. m., or as soon thereafter as counsel can be heard, for an allowance to them out of the property described in said decree for their services and disbursements herein.

Dated November 7, 1928.

PATTERSON, EAGLE, GREENOUGH & DAY.
HUMMER & FOSTER.
COCHRAN & ELLISON.
MCCRORY & MONK.

To CHARLES H. TUTTLE, Esq.,
United States Attorney,
Solicitor for United States of America.

Due and timely service of the foregoing notice of motion and annexed affidavits is hereby admitted.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America, Intervenor.

210 In United States District Court

[Title omitted.]

Affidavit of Carroll G. Walter in support of application for allowances

STATE OF NEW YORK,
County of New York, ss:

Carroll G. Walter, being duly sworn, deposes and says:

I am a member of the firm of Patterson, Eable, Greenough & Day, solicitors for the plaintiff herein.

I was admitted to the bar of the State of New York in 1908, and have been engaged in active practice since that time. In addition to general practice in the State courts and in this court I have conducted

cases in the Supreme Courts of Virginia and Pennsylvania, United States District Courts for the Eastern and Northern Districts of New York and the Northern and Southern Districts of Ohio, the Circuit Courts of Appeals for the First, Second, and Sixth Circuits, and the Supreme Court of the United States.

211 My firm was retained on behalf of the plaintiff in this case in January, 1925, the retainer being by Elmer S. Bailey, the then acting guardian of Jackson Barnett, acting through the law firms of Hummer & Foster, of Henryetta, Oklahoma, and Cochran & Ellison, of Okmulgee, Oklahoma.

During the two years succeeding the retainer approximately one-third of my working time was devoted to this case. In addition to my personal work some services have been performed by other members of my firm and considerable service has been performed by lawyers employed by the firm, and there has also been a vast amount of stenographic service.

The case was taken by my firm entirely upon a contingent basis, and that necessarily had to be the basis because said guardian had no funds with which to pay for services and the Government officials having the custody and control of the restricted funds of Jackson Barnett refused to permit any of such funds to be used for the purpose of prosecuting this case, as is more fully shown in the other affidavits hereto annexed and in the testimony constituting part of the record herein.

The case was novel both upon the law and the facts, and by reason thereof required an extraordinary amount of original research.

Upon its facts the case was so strange and amazing as to tax credulity, despite the implicit confidence I had in the counsel who first laid the strange tale before me, and by reason thereof I felt it my duty to, and I actually did, scrutinize with the greatest care every bit of evidence and every propositon of law.

212 My services began with conferences with Mr. Foster and Mr. Cochran as to the proper form of action, the proper forum, and the name in which the suit should be instituted, and investigations of numerous questions of law upon those subjects, including the right of an Indian to sue, the right of a guardian to sue, and the theory and function of a prochein ami.

There then followed the preparation of the bill, which it was first through could be based upon the simple proposition that a mental incompetent had made a gift which was void because of his mental incapacity.

In due course the defendants filed answers in which they set up as a defense that the plaintiff was and is a so-called "restricted Indian" and as such was subject to the jurisdiction of the Secretary of the Interior, who had approved the gift, and that in view of such approval no person had any right to attack the validity thereof.

In view of such answers it was concluded by my associates and myself that there should be filed an amended bill setting out in detail the facts as to how the gifts and the Secretary's approval thereof had been obtained. A rather lengthy amended bill was then prepared and filed on May 7, 1925.

Elaborate answers thereto were filed by the defendants in June, 1925. In those answers the defendants put in issue substantially all the material averments of the bill, including the fact of Barnett's alleged mental incompetency, and again set up the same defense that the Secretary's act in approving the gift was not subject to attack.

213 Those answers thus made necessary the taking of extensive depositions upon several very broad issues including (a) the mental competency of Barnett, (b) the conspiracy by which the gifts were alleged to have been obtained. They necessitated also an extensive investigation into a subject of law practically unknown in this jurisdiction, viz, the laws relating to the allotment of lands of Indians of the Five Civilized Tribes and the leasing of such lands, particularly leases for oil and gas, and the jurisdiction and authority of the Secretary of the Interior over such allotted lands and their proceeds and the royalties of such leases.

The taking of the depositions necessarily would involve considerable cash outlay and the problem was presented as to how the necessary funds for that purpose could be obtained. Thereupon, in October, 1925, a motion was made for an allowance of $3,000 out of the income in the hands of the defendant Trust Company for the purpose of defraying the expenses of the prosecution of the suit. A somewhat similar motion previously had been made in the Supreme Court of the District of Columbia in a similar suit there pending relating to that part of the $1,100,000 which had been given to Mrs. Barnett and placed by her in trust with the Riggs National Bank; and such motion had been denied by that court because the justice there presiding "doubted" his authority to grant it. In view of that expression of doubt an extensive investigation of the law as to the authority of the court in such matters was necessary and was made.

The affidavits upon the motion for allowance for expenses exceed 20 pages in length and the brief and reply brief submitted
214 thereon exceed 60 pages and cite many authorities respecting the authority of courts of equity over incompetents. The motion was vigorously opposed by the defendants. Their answering affidavits consisted of 11 pages; their brief in opposition consisted of 7 pages, and one of their counsel came to New York from Oklahoma for the purpose of arguing in opposition to it. The motion was twice argued before Judge Thacher and finally was granted by an order dated March 2nd, 1926. That motion was solely for expenses, no counsel fees being then either asked or granted. The order directed the defendant Trust Company to pay out of the income from the $550,000 of bonds in its possession the sum of $3,000, of which $1,000

was to be paid to my firm and $2,000 to the firm of Hummer & Foster. The order further provided as follows:

"Ordered, that said $3,000 shall be applicable only to such expenses of this suit as shall hereafter be allowed and approved by this court. Expenses incurred for the benefit of all suits heretofore brought by said Bailey for the recovery of any part of the $1,100,000 mentioned in the amended bill herein shall be deemed expenses of this suit to the extent of such proportion of the total thereof as the amount claimed in this suit bears to the amount claimed in all such suits, which proportion the parties agree is 550/915."

While the motion for an allowance for expenses was pending before Judge Thacher, the United States of America, through the
215 Department of Justice and the United States attorney for the Southern District of New York, moved for leave to intervene in this case and to file a petition of intervention wherein it prayed that the defendants be decreed to have received $550,000 of Liberty bonds as the property of Jackson Barnett, that they be required to account for such bonds and the proceeds and all interest and profits therefrom, and that "after deducting the reasonable expenses incident to this litigation said bonds and the proceeds thereof and the interest and profits thereon be delivered and paid over to the Secretary of the Interior of the United States."

That intervention was consented to by my firm on behalf of the plaintiff, and indeed it fairly may be said that the intervention was brought about through the efforts of the plaintiff, as is more fully set forth in the annexed affidavit of Mr. Cochran. The defendant Mission Society opposed the intervention and one of its counsel again came from Oklahoma to New York for the purpose of arguing in opposition thereto. I personally participated in the matter to the extent of conferring with Assistant United States Attorney Crawford and furnishing him with some authorities supporting the right of the United States to intervene. The motion to intervene was granted by an order dated January 29, 1926.

Answers to the intervening petition was filed by the defendants and served upon my firm and it became necessary to study those answers. Subsequently the United States filed an elaborate amended petition of intervention in April, 1926. That amended peti-
216 tion required additional study and in addition a number of conferences were had with the solicitors for the defendants and with Assistant United States Attorney Crawford with respect to the filing thereof.

On April 30, 1925, I made a trip to Washington, D. C., for the double purpose (a) of conferring with Mr. Foster with reference to the prosecution of this suit, and (b) of listening to the argument of a series of motions in the case in the Supreme Court of the District of Columbia involving a part of the $550,000 of bonds which had been given to Mrs. Barnett. Those arguments lasted substantially an entire day and covered a great part of the law and facts involved

in this case. Some of the arguments were made by Mr. Rogers and Mr. Lyttle, who there appeared for Mrs. Barnett and who subsequently appeared in this case for the defendant Mission Society.

In November, 1925, I made another trip to Washington, D. C., for the purpose of conferring with Mr. Foster and Mr. Cochran, who were then in Washington having conferences with the Department of Justice with reference to its intervention in this case.

In March, 1926, I made a third trip to Washington, D. C., for the double purpose (a) of conferring with the Department of Justice with reference to the prosecution of this case, and (b) of obtaining and studying the minutes of the hearings before the sub-committee of the Committee on Indian Affairs of the House of Representatives, which in January, 1925, had investigated certain charges against Commissioner Burke with reference, among other things, to
217 the action taken by him in connection with the transfer of the $1,100,000 of bonds here in controversy. Those minutes were exceedingly voluminous, consisting of approximately 2,000 pages, and I felt it my duty to, and I did, examine the same with great care. Among the witnesses who testified before that congressional committee were A. J. Ward and Harold McGugin and Assistant Commissioner Merritt, and their testimony was of the greatest importance and required a great amount of time in its examination and study.

From that time, i. e., the end of March, 1926, until the end of January, 1927, I was engaged upon this case almost continually, and devoted many evenings and Sundays to work upon it.

The months of April and May, 1926, were devoted to the study of documents and voluminous correspondence with Mr. Foster with respect thereto and with respect to the obtaining of necessary copies and the locating of witnesses and to arranging for the taking of their depositions.

About May 18, 1926, I gave notice of the taking of the depositions of various witnesses on behalf of the plaintiff at Henryetta, Oklahoma, on June 1; at Tulsa, Oklahoma, on June 8; at Coffeyville, Kansas, on June 10; and at Washington, D. C., on June 15, 1926. Similar notices were then given on behalf of the United States. A stipulation was then negotiated and entered into between the parties, by which it was provided that the plaintiff and the United States should be at liberty to take under said notices the testimony of additional witnesses not named in the notices and that the defendants should be at liberty to take the testimony of witnesses on their
218 own behalf at any or all the places specified in said notices and before the officers therein named without the giving of any notice except notice to the counsel then attending at said places respectively. Shortly thereafter the defendant Mission Society gave notice that it would take the depositions of various witnesses at Washington, D. C., on June 15th, and at Los Angeles, California, on June 28, 1926.

I left New York for Oklahoma on May 27, 1926, and was continuously absent from New York until June 19, 1926. During that

interim my entire time was devoted to work upon this case, including evenings and Sundays, and during practically the whole of that time Mr. Foster was engaged with me. By that time we had obtained copies of several hundred letters and documents on file in the office of the Secretary of the Interior, making up about 1,000 pages of typewritten matter, every word of which I read and digested for the purpose of determining its bearing upon this case.

May 29, 30, and 31, 1926, were devoted to conferences with Mr. Foster and with various witnesses to be examined in Henryetta. June 1, 2, 3, 4, and 5 were devoted to the taking of the depositions of upwards of 20 witnesses on behalf of the plaintiff and 8 witnesses on behalf of the defendants. Some of the examination was conducted by Mr. Foster and some by myself. We both endeavored to be always present, but in order to save time and expedite the matter and maintain the schedule laid out for the taking of the depositions in other places we sometimes had to resort to the device of his interviewing one witness while I examined another and then of my interviewing still another witness while he examined the one whom he had interviewed.

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The evenings of those days were devoted partly to the interviewing of other witnesses to be examined at Henryetta and partly to preparation for the examination of Mr. Mott and other witnesses at Tulsa, the examination of Mr. McGugin at Coffeyville, and the examination of Mr. Burke at Washington. The days and evenings of June 6 and 7 were spent in the same way. Preparation for the examination of Mr. McGugin necessitated the preparation of a petition and order for a subpoena duces tecum requiring McGugin to produce certain documents which had to be enumerated in advance, and the obtaining of such order from Judge Pollock at Kansas City. Preparation for the examination of Mr. Burke necessitated preparation of a list of upwards of 100 documents which he was requested to produce from the files of his office. It was necessary also to obtain certified copies of numerous documents from the County Court of Okmulgee County and from the office of the Superintendent of the Five Civilized Tribes at Muskogee.

June 8 and 9, 1926, were devoted to the taking of the depositions at Tulsa. The evenings of those days were devoted to conferences with Mr. Foster and Mr. Cochran and with Mr. Shelby, special assistant to the Attorney General.

June 10, 1926, was devoted to the taking of the deposition of Mr. McGugin at Coffeyville.

With two exceptions all the days devoted to the taking of depositions were full days running from 9 or 9.30 o'clock in the morning to 5.30 or 6 o'clock in the evening, and the taking of the deposition of Mr. McGugin lasted until after 7.

220

On June 11, 1926, I returned from Coffeyville to Henryetta, made further preparations for the Washington depositions

and then left for Washington with Mr. Foster on the afternoon of June 12th. Our preparations continued on the train on June 13th.

June 14 was devoted to conferences with Assistant Attorney General Parmenter, Special Assistant Selby, and with other lawyers of the Department of Justice.

June 15, 16, 17, and 18 were devoted to the taking of the depositions of Mr. Burke and of the other witnesses in Washington. These also were full days with the exception of the 18th; and as usual the evenings were devoted to further preparation.

Upon my return to New York I endeavored to arrange to have the case set for trial during that month, but was unsuccessful.

Shortly after that I began preparation of the brief and worked on it from time to time during the summer.

On August 25, 1926, the defendant mission society served notice that it would take the depositions of various witnesses at Los Angeles on September 20; and on September 1 it served notice that it would take the depositions of various witnesses at Henryetta on September 9, and the depositions of various witnesses at Tulsa on September 13. I thereupon made a motion to vacate and set aside those notices on the ground that the time for the taking of depositions had expired and that the taking of further depositions at Henryetta and Tulsa by the defendant was not in accord with the stipulation above men-
221 tioned. The preparation of the affidavits for and the argument of that motion occupied a number of days, there being at least three appearances before Judge Thacher with respect thereto. By an order dated September 16, 1926, this motion to vacate was denied upon condition that the defendant mission society pay to the solicitors of record for the plaintiff $4,500 on account of counsel fees and $750 for expenses for attending upon the taking of the depositions, but if the mission society failed to make the payments, the motion to vacate was granted. The mission society elected not to make the payments, and those depositions were not taken.

In October, 1926, the defendant mission society asked leave to file an amended answer to the amended petition of intervention of the United States, and after several conferences with respect thereto a consent order permitting the filing of such amended answer was entered.

Later in October, 1926, I learned that Jackson Barnett was in Oklahoma in the custody of a United States marshal, having been brought there, as I was informed, for the purpose of appearing before the Federal grand jury in some investigation. I then had some conferences with representatives of the Department of Justice with reference to the possibility of having Barnett brought to New York for the trial of this case, and I collaborated with Assistant United States Attorney Crawford in obtaining from this court a writ of habeas corpus ad testificandum directing the United States marshal to produce Jackson Barnett before this court on October 15, 1926,

which was the date when it was expected that the case would be tried.

222 Barnett was brought to New York by the marshal in obedience to that writ, and on October 12, 1926, I had an interview with him in the presence of Assistant United States Attorney Crawford at the office of the United States attorney.

During October, 1926, much time was consumed in answering the calendar and in endeavoring to have the trial fixed for a day certain. At one time when it appeared that the case would be reached for trial Mr. Foster came on from Oklahoma for the purpose of attending, but then returned when the case was adjourned.

Meanwhile I was continuing to work upon the brief and Mr. Foster's presence here was utilized as an opportunity for further conference with reference to the same.

On October 27, 1926, I went to Washington in company with Mr. Foster and Special Assistant Selby, for the purpose of discussing with Attorney General Sargent some of the questions of law involved in this case, and at that conference Solicitor General Mitchell also was present.

On October 28 and 29, 1926, I attended upon the taking of depositions of four witnesses on behalf of the defendants at the office of Mr. Fettretch in New York, and also cross-examined those witnesses. The taking of those depositions consumed the whole of both days. Those witnesses had been brought on to New York for the purpose of testifying upon the trial, and in order to relieve the defendants from the necessity of holding them over until the adjourned date or having them return to New York, I consented that their depositions might be then taken out of court.

223 The trial of the case started on November 16th, and was continued on the 17th, 18th, 19th, 22nd, 23rd, and 24th.

Mr. Foster was present with me throughout the trial and also remained for several days thereafter, working with me day and night and Sunday in preparation for the next day's hearing or upon the brief. During that time Mr. Cochran was in Washington and on two occasions he came over to New York on Sunday and spent the day working with Mr. Foster and me on the brief.

The brief for the plaintiff was finally completed on December 16, 1926. On that day Mr. Fettretch requested an extension of time, and after appearing before Judge Knox the time for exchanging briefs was extended to December 31st, and the time for reply briefs was fixed at January 10, 1927, which subsequently was extended to January 15th.

I received the mission society's brief on December 31, 1926, and then prepared plaintiff's reply brief, which was completed and submitted on January 15, 1927.

On January 17, 1927, I was served with a notice of motion by the defendant mission society for an order requiring Bailey to give security for costs. I examined the law with reference to requiring

a prochein ami to give security for costs, and prepared a brief and made an oral argument in opposition to the motion, and the motion was denied.

At about the same time I prepared papers for and served notice of a motion for a further allowance of $2,000 for expenses. When the motion came on for hearing Judge Thacher suggested that
224 as counsel already had laid out of the money and the case had been tried (and the allowance thus was not necessary to enable the suit to be prosecuted) he thought the application might well wait until a decision was announced so that it could be taken up along with any other application for allowance which might then be made. With his permission I thereupon withdrew that motion.

On August 9, 1927, this court handed down its opinion, holding the gift invalid (21 Fed. 2d, 325–332). The court had thus had the case under advisement a little over seven months.

Shortly after the decision was announced Mr. Foster and Mr. Cochran came to New York for a conference with respect to the proposed accounting and the form of the decree and other questions. While in New York on that trip they prepared, in conjunction with myself their affidavits, which are hereto annexed and herewith submitted in support of this application for allowance.

At my suggestion the Equitable Trust Company submitted its account without having the cause referred to a master for the purpose of taking and stating the account. Upon checking over the account which it submitted I found that it had paid itself certain commissions. I felt that it was not entitled to such commissions and so advised its counsel, and by agreement between such counsel and myself the question was submitted to Judge Knox. In that connection I prepared and submitted a memorandum of law nine pages in length and citing twelve authorities. Judge Knox ruled that the trust company was not entitled to commissions, and the trust company thereupon submitted a new account, which did not in-
225 clude any charge for commissions. That account was then accepted and a final decree was entered on November 21, 1927, directing the trust company to deliver to the Secretary of the Interior of the United States, to be held by him as property of Jackson Barnett under and pursuant to the acts of Congress relating thereto, the following-described property, which appeared from said account to be in his possession, to wit:

$155,000.00 par value United States of America 4th Liberty loan 4¼s, due October 15, 1938.
100,000.00 par value United States of America 1st Liberty loan 3½s, due June 15, 1947.
80,000.00 par value United States of America 2nd Liberty loan converted 4¼s (exchanged for 2nd, 4s originally received).
216,000.00 par value United States Government 4s, due December 15, 1954.
108,000.00 par value United States of America Treasury notes 4½s, due December 15, 1927.
777.27 in cash.

650,777.27

The decree contained a further provision, however, for retaining jurisdiction of the cause and of the property above described for the purpose of thereafter entertaining and deciding applications by counsel for allowances out of said property for their services and disbursements.

226 In February, 1928, the defendant mission society appealed, or at least attempted to appeal, from said decree of November 21, 1927. It served and filed a notice of appeal, assignment of errors, and a bond, and obtained a citation. A motion was then made on behalf of the plaintiff to dismiss said appeal upon the ground that the defendant trust company was a necessary party appellant and had not joined in such appeal.

The work in connection with the preparation of said motion to dismiss was performed by my partner, Mr. Patterson, in conjunction with Mr. Foster, who came to New York for the purpose. The motion papers embraced approximately 150 pages.

After the notice of motion to dismiss the appeal was served, the mission society served notice of a motion in the district court for an order severing the case of the mission society from that of the trust company nunc pro tunc as of a date prior to the expiration of three months from the date of the entry of the decree. The law with respect to such motion was examined and a brief in opposition thereto was prepared. After that work was done the mission society voluntarily withdrew the motion before the same came on for hearing. It then served notice of a motion in the Circuit Court of Appeals for an order granting leave to the trust company to join in and become a party appellant to the appeal and to amend the notice of appeal theretofore served by the mission society by adding the trust company thereto as an additional appellant.

The plaintiff's motion to dismiss the mission society's appeal and the mission society's motion for leave to join the trust com-

227 pany as an additional appellant, were argued orally before the Circuit Court of Appeals on April 9, 1928. I also prepared and submitted upon those motions a printed brief of 30 pages citing upwards of 40 authorities.

On May 7, 1928, the Circuit Court of Appeals denied the motion to amend and granted the motion to dismiss. It delivered an elaborate opinion by Judge Swan, which is reported in 26 Fed. (2d), 350–354.

Within the three months allowed by law the mission society filed a petition to the Supreme Court of the United States for a writ of certiorari, with a brief in support of such petition. In that petition the mission society asked for a review, not only of the decision of the Circuit Court of Appeals but also of the decision of this court. That petition and brief, with appendices, consisted of 33 printed pages. In opposition thereto I prepared, in conjunction with Mr. Foster and Mr. Cochran, a brief of 24 printed pages citing 50 authorities. I also conferred and collaborated with the Department of Justice in the preparation of a separate brief submitted by the

United States in opposition to the mission society's petition for a writ of certiorari.

The petition for certiorari was submitted to the Supreme Court of the United States on October 1, 1928, and was denied by it on October 22, 1928.

The case has thus finally terminated with complete success for the plaintiff after a strenuously contested litigation which lasted nearly four years.

By orders of this court the time for making applications for allowances pursuant to paragraph 3 of this court's decree of
228 November 21, 1927, has been extended to twenty days after the denial of such petition for a writ of certiorari.

The pleadings in this case cover 163 pages. The plaintiff's depositions at Henryetta cover 560 pages. Those at Tulsa cover 195 pages and 15 pages of exhibits. Those at Coffeyville cover 188 pages of testimony and 35 pages of exhibits. Those at Washington cover 399 pages of testimony and 425 pages of exhibits offered by the plaintiff and 318 pages of exhibits offered by the defendants upon the taking of those depositions. The depositions taken by the defendants at Henryetta cover 330 pages, and those taken by the defendants at New York cover 180 pages. The minutes of the trial cover 783 pages. A number of additional exhibits of great volume were also offered upon the trial. The total number of exhibits offered by the plaintiff was 191. The record thus embraces more than 3,500 pages. The brief for the plaintiff in this court covers 446 printed pages, and the reply brief covers 27 printed pages.

In connection with the prosecution of the case I have written 200 letters and 70 telegrams, and have received and read 230 letters and 50 telegrams. Many of the letters were of great length and contained extended discussions of questions of law, questions of testimony, and questions of policy.

In the prosecution of this suit the following expenses have been necessarily incurred and actually paid by my firm:

Deposit for clerk's fees in District Court	$15.00
Marshal's fees	4.48
Copy of opinion of Judge Thacher	1.80
229 Traveling expenses, including 4 trips to Washington to examine documents and confer with Department of Justice, and trip to Henryetta and Tulsa, Oklahoma, Coffeyville, Kansas, and Washington, D. C., for the purpose of taking depositions	553.99
Telegrams and telephones	132.36
Certified copies of documents, photostats, special paper for exhibits, and testimony	62.45
Bar Association room charges	11.30
Expressage	4.87
Notary fees and carfares	2.60
Dinners and overtime	49.75
Minutes of trial, and copy of defendants' New York depositions	738.75
Printing Brief for plaintiff	973.74
Printing reply brief and addenda thereto	63.45
Copy of opinion of Judge Knox	10.00
Printing of said opinion	30.00

Outside stenographic services in preparing papers for motion in Circuit Court of Appeals to dismiss appeal	$77.02
Clerk's fees on motion in Circuit Court of Appeals	8.60
Printing brief for Circuit Court of Appeals	42.70
Copy of opinions Circuit Court of Appeals and Judge Knox's second opinion	5.30
Printing brief for Supreme Court in opposition to petition for writ of certiorari	61.80
Total	2,849.40

230 All said expenses were actually necessary and are reasonable in amount; and no part thereof has been paid except the $1,000 paid by the Equitable Trust Company pursuant to the order herein on March 2, 1926.

In addition to the services in this case I have rendered some assistance to Mr. Foster and Mr. Cochran in the "prohibition case" and in the proceedings to vacate the guardianship in Oklahoma, which are referred to in greater detail in the affidavits of Mr. Foster and Mr. Cochran hereto annexed.

The prosecution of this case has been opposed, not only by the defendants therein but also by Mrs. Barnett and the Department of the Interior. From the time the gifts were made down to and including the trial the attitude of the Department of the Interior was thoroughly hostile to the suit, and it not only persistently refused aid in the recovery of the money but it also refused to permit the use of any of Barnett's money in the prosecution of the suit and it actively aided the defendants in opposing it. (See pp. 209–215, 221–230, 247–265 of brief for plaintiffs in this court, and testimony and exhibits there referred to.) Commissioner Burke's presence in court throughout the trial in company with the defendant's counsel, and his active assistance to the defendants both personally and through his assistant, Mr. Dawson, will be well remembered by the court. Furthermore, Secretary Work himself, although not the Secretary who approved the gifts, went so far as to request the Attorney General to decline to assist in the prosecution of the suit.

231 Thus, in a letter from him to the Attorney General, dated February 7, 1925, he said (Pltff.'s Wash. dep., Vol. V, pp. 867–868):

"The matter has been fully considered in this department, and I see no reason why your department should assist the above named Elmer S. Bailey or his attorney in litigation to invalidate the action taken by this department in relation to the above mentioned distribution of Liberty loan bonds out of the Jackson Barnett estate. It is therefore requested that you decline the above mentioned request of Messrs. Hummer & Foster, attorneys for Elmer E. Bailey, to assist them in the litigation which they have instituted in the Jackson Barnett matter. A copy of my letter of January 27, 1925, to Messrs. Hummer & Foster, declining to authorize the use of the funds of Jackson Barnett to finance the litigation is enclosed for your information."

The suit thus has been successfully prosecuted over the protest and in the face of the steadfast opposition of the department of the Government to which the court finds the money should be returned.

That the Department of Justice finally intervened in the case on the side of the plaintiff and assisted in its prosecution is due entirely to the strenuous efforts of counsel for the plaintiff, Mr. Cochran and Mr. Foster, as is more fully set forth in their affidavits, to which reference is hereby made.

Moreover, the successful prosecution of the suit necessitated going into the enemy's camp and extracting the facts from the
232 mouths of hostile and adverse witnesses, (McGugin, Mott, Ward, and Burke), and from documents in their possession.

No compensation for any services rendered by counsel for the plaintiff has been paid.

CARROLL G. WALTER.

Sworn to before me this 31st day of October, 1928.

LILLIAN M. JACOB,
[SEAL] *Notary Public, Kings County.*

Kings Co. clerk's No. 81; registers' No. 196.
New York Co. clk's No. 242; reg.'s No. 0-164.
Commission expires March 30, 1930.

233 In United States District Court

[Title omitted.]

Affidavit of Rayburn L. Foster in support of application for allowances

STATE OF NEW YORK,
County of New York, ss:

Rayburn L. Foster, being duly sworn, deposes and says:

I reside in Henryetta, Oklahoma. I was admitted to the bar of that State in 1916, and have been engaged in the practice of law there since that date. I am also a member of the bar of the Supreme Court of the United States. At all times hereinafter mentioned I was a member of the firm of Hummer & Foster.

In June, 1924, the County Court of Okmulgee County, Oklahoma, accepted the resignation of Carl J. O'Hornett as guardian of the person and estate of Jackson Barnett, an incompetent, and appointed Elmer S. Bailey as such guardian in his place and stead.
234 Bailey retained my firm as his counsel immediately after his appointment, and from that time until February, 1927, I was engaged in investigating the transaction out of which this suit arose and in conducting this suit and other litigation connected therewith. As a conservative estimate I would say that three-fourths of my working time during that period has been spent upon those matters, and for none of those services have I received any compensation whatsoever.

I studied the legal questions presented by a gift by an incompetent Indian of his restricted funds approved by the Secretary of the Interior, and endeavored to learn the detailed facts as to how this gift had been obtained. I conferred with Carl J. O'Hornett, the former guardian, and with Ex-Judge McCrory, of the firm of McCrory & Monk, who had been counsel for O'Hornett during the time he had acted as guardian, and examined some of the records of the County Court and ascertained: (a) that the County Court had found that the gifts were of such doubtful validity as to require suits for the recovery thereof and that the guardian was without available funds for that purpose, and had directed the guardian to apply to the Secretary of the Interior and to the Superintendent of the Five Civilized Tribes for funds and cooperation in the bringing of such suits; (b) that despite such orders no funds for that purpose had been supplied; and (c) that O'Hornett, through McCrory & Monk, as his attorneys, had petitioned Secretary Work to vacate the order approving the distribution and solicited his cooperation and support in recovering the money, and that such petition had been denied, or at least ignored.

235 In fact, I was informed that one of the things which had led O'Hornett to resign was the fact that he could obtain no help, either financial or otherwise, in taking up the heavy burden of instituting and prosecuting suits for the purpose of setting aside the gifts.

Exclusive of the $1,100,000 which had been so transferred, and the income and proceeds thereof, the only property owned by Barnett was (a) a small amount of real estate located near Henryetta which was of nominal value only and produced practically no income, and (b) his allotment of 160 acres in Creek County, which was restricted from sale and produced no income other than the royalties under the lease mentioned in the bill herein, which royalties, under the terms of said lease, were payable and were being paid to the Superintendent of the Five Civilized Tribes at Muskogee. Practically no funds came into Bailey's hands either at the time of his appointment or subsequently, and the superintendent refused and the Secretary refused to pay said royalties or any other of Barnett's funds to Bailey. In fact, they would not even pay to Bailey any funds for Barnett's support, and, on the contrary in a very short time began paying Barnett's funds to a guardian appointed in California.

The task of recovering the $1,100,000 thus looked almost hopeless. On , 1924, I entered into a contingent fee contract with Bailey as guardian, which contract was approved by the County Court of Okmulgee County. A copy of said contract is hereto annexed and is hereby asked to be read in connection with and as a part of this affidavit.

236 I retained the firms of Cochran & Ellison and McCrory & Monk, of Okmulgee, Oklahoma, to co-operate with my firm in attempting to recover the $1,100,000 upon an agreement that they

would share with my firm in the fees which would be realized in the event of success.

It was always understood and agreed between Cochran & Ellison and McCrory & Monk and Bailey and my firm that compensation for our services was to be contingent upon success, and that necessarily had to be the agreement because of Barnett's incompetency to make any contract and the absence of any fund out of which fees could be paid except in the event of success.

In January, 1925, I went to Washington, D. C., and attended a number of hearings before the subcommittee of the Committee on Indian Affairs of the House of Representatives, which was then investigating this gift of the $1,100,000 of Barnett's funds. I attended for the purpose of learning the facts as to how the gifts in question had been made. Mr. Cochran and Judge McCrory were with me. Bailey and O'Hornett were also present. I was away from my office on that occasion for about three weeks.

While in Washington on that occasion I went to New York and consulted with the firm of Patterson, Eagle, Greenough & Day, and retained that firm to bring this suit.

The services rendered in this suit are set forth in the annexed affidavit of Mr. Walter and I will not repeat them.

I was in constant communication with Mr. Walter by mail
287 and telegraph throughout the entire period of the prosecution of this suit, participated in the preparation of bill and amended bill and of the affidavits upon the motion for an allowance for expenses, located and arranged for subpoenaing the various witnesses who were examined at Henryetta, Tulsa, and Coffeyville, interviewed a large number of those witnesses, attended at the taking of all of the depositions at Henryetta, Tulsa, Coffeyville, and Washington, was present in New York throughout the trial, also made several other visits to New York in connection with the case (making, in all, five trips to New York and two to Washington, when I did not come to New York), and collaborated with Mr. Walter in the preparation of the brief for the plaintiff.

In addition thereto I rendered other separate services which were necessary for the proper prosecution of this suit and which I will now narrate.

In September, 1924, I wrote the Secretary of the Interior protesting against recognition by him of the guardian which had been appointed for Barnett in California. The Secretary replied that the matter was being given consideration and that I would be advised of any action taken by his department. Despite that promise, the Secretary paid large sums to the California guardian without advising Bailey or me, and we learned the facts only through the congressional investigation in January, 1925.

In January, 1925, Mr. Cochran and I had a number of personal interviews with various officials of the Department of the Interior and of the Department of Justice, including Secretary Work, Com-

sioner Burke, and Assistant Attorney General Wells. At
238 these interviews we persistently urged that the gifts in question were invalid, that it was the duty of Bailey to have them set aside, and that it was the duty of both the Department of the Interior and the Department of Justice to aid and assist in so doing. To substantiate our contentions we submitted authorities and other data. That is especially true with respect to Assistant Atttorney General Wells.

On January 21, 1925, while in Washington, I supplemented the oral interviews with formal letters to Commissioner Burke and Secretary Work requesting sufficient funds out of the estate of Jackson Barnett to finance the litigation necessary to try out the questions as to the validity of the distribution. Secretary Work replied by letter dated January 27, 1925, as follows (pltff.'s Ex. 121, pltff.'s Wash. dept., p. 682):

"Reference is made to your request of January 21, 1925, for sufficient funds out of the estate of Jackson Barnett, Creek Indian, to finance litigation as to the validity of a certain distribution made of United States Liberty loan bonds of the par value of $1,100,000 out of the said estate.

"The matter has been fully considered and I see no reason for permitting the funds of Jackson Barnett to be used for expenses in litigation referred to in your letter. I must therefore decline to authorize the use of his funds for such purpose."

On February 14, 1925, I again presented the mattery to the Secretary of the Interior in a letter of over four closely typewritten
239 pages, in which I called his attention to several suits which had been brought respecting the distribution and cited some authorities. Among other things I said:

"To properly urge the invalidity of this disbursement, it will be necessary to take a large number of depositions at considerable expense, and we do not believe you will be justified in withholding the funds of Jackson Barnett and preventing his making a bona fide defense to this action and in seeking to recover the funds so disbursed. No just criticism could be offered at your permitting a reasonable amount of his funds to be used to test the validity of the disbursement of the estate, when the validity of such transaction is conceded by all to be of grave doubt. Because you may not believe these funds should be recovered for his estate does not justify you, in our opinion, in withholding funds to have the question determined by the courts, even though you may have the power to do so. By so doing you prevent a fair presentation of the facts to the court, which is the proper tribunal to determine the validity of the transaction.

"We are of the opinion that just criticism may be levelled at you should you persist in aiding and abetting Mrs. Barnett in this action by refusing to permit the use of the funds of Jackson Barnett in his defense. The policy of your department since 1922, the time when this distribution of Jackson Barnett's funds was made, has been to

aid and assist Mrs. Barnett in her desire to acquire control
240 of his estate and to prevent the recovery of the same from her.

We insist that this policy is wrong and now that the interests of Mrs. Barnett and those of Jackson Barnett are adverse, not only in fact but in the courts, you can no longer afford to maintain this policy.

* * * * * * *

"In fairness to yourself and in fairness to the interests of Jackson Barnett, we suggest that the very least thing you can do is to submit these questions to the Attorney-General of the United States for an unbiased opinion, and we respectfully request that you do so."

Very shortly after that letter was written the congressional committee above mentioned submitted its report and in that report it said:

"There are now pending three suits in the Federal courts—one against the superintendent and disbursing officer of the office of the Five Civilized Tribes at Muskogee, one against the Riggs National Bank, of Washington, D. C., and one against the Equitable Trust Co., of New York, which suits, if prosecuted to a final determination, will settle definitely the question of whether or not the distribution of $1,100,000 of the estate of Jackson Barnett as made is legal.

"It would be futile for your committee to express an opinion as to whether the various officials of the Interior Department who approved of the division of funds of Jackson Barnett acted within the law. That is a question which can be determined solely by the courts.

241 "Your committee is of the opinion, however, that this is a question of such fundamental importance that it should be determined by the courts as soon as possible. We therefore are of the opinion that the Secretary of the Interior would be justified in expending a reasonable sum out of the funds of Jackson Barnett in securing an early determination by the Supreme Court of the United States of the issues which have been raised."

Despite that recommendation, Secretary Work wrote me under date of March 12, 1925—which was nearly one month after that report had been submitted—as follows (Pltff.'s Ex. 122, pltff.'s Wash. dep., p. 683):

"I have given full and careful consideration to your communication with reference to the funds of Jackson Barnett. Every legal question connected with this matter will be settled in the litigation now pending in the courts. I do not feel, under the circumstances, that I would be justified in using the funds of Jackson Barnett in the way suggested in your letter."

The litigation which was then pending included not only this suit and a similar suit brought by Bailey in the Supreme Court of the District of Columbia with reference to a part of the $550,000 given to Mrs. Barnett, but, also, a suit brought by Mrs. Barnett in this court to establish the validity of the gift of $550,000 to the defendant

242 mission society and a similar suit brought by her in the Supreme Court of the District of Columbia to establish the validity of the gift of the $550,000 to her. It was quite true, therefore, that the legal questions would be settled in the litigation then pending, as stated in Secretary Work's letter. But obviously it could not be expected that the questions would be settled right unless there was an adequate presentation of Barnett's side, and it was that fair presentation of that side which Secretary Work sought to prevent.

In this connection attention is also called to Secretary Work's letter to the Attorney General dated February 7, 1925, in which he requested the Attorney General to decline my request for the Attorney General's co-operation and assistance in the litigation. (Pltff.'s Wash. dep., pp. 867–868.) Our efforts to secure the assistance of the Department of the Interior thus ended in failure and left us to carry the burden of the litigation as best we might. During this same period, as above stated, Mr. Cochran and I were carrying on our efforts to secure the assistance of the Department of Justice. In addition to personal interviews we prepared and submitted a letter or memorandum of 12 closely written typewritten pages setting forth such of the facts as we had then learned an authorities as to the law.

As appears from the record herein, Attorney General Stone announced on February 9, 1925, in a letter to Secretary Work, that he thought the distribution of the $1,100,000 was entirely unauthorized and that it was the duty of the Government to use its best efforts to assist in recovering the same. (Pltff.'s Ex. 141, pltff.'s Wash.

243 dep., pp. 780–781.) However, no actual assistance came from the Department of Justice, and as late as April 16, 1925, that department, by Emory R. Buckner, United States attorney; Isaac K. Wells, Assistant Attorney General, and H. L. Underwood, special assitant to the Attorney General, filed an answer on behalf of Secretary Work and Commissioner Burke to the bill filed in this court by Mrs. Barnett as alleged prochein ami of Jackson Barnett. That bill was verified by M. L. Mott and was signed by M. L. Mott and L. O. Lyttle as plaintiff's counsel (the plaintiff being Jackson Barnett by his prochein ami, Anna Laura Barnett). Paragraph 37 of that bill alleged that Jackson Barnett, being "of a disposing mind, realizing those who were entitled to his bounty and the effect of a gift upon his estate, did request in writing that out of the aforesaid trust fund in the hands of the Department of the Interior of the United States certain gifts should be made" (referring to said gifts of $1,100,000), and that said gift was approved by the Department of the Interior. With respect to that paragraph of said bill, the answer so filed as aforesaid set forth:

"Answering paragraph 37 of said bill they admit the defendant Jackson Barnett made the request in writing therein described, and that departmental approval and sanction was given to the disposition of the designated property of Jackson Barnett as therein specified. Further answering the allegations in said paragraph these

defendants aver that prior to the approval of these gifts the said Jackson Barnett appeared in person before the then Assist-
244 ant Secretary of the Interior F. M. Goodwin, to whom was assigned, pursuant to the authority of the Secretary of the Interior, the direction and supervision for the Secretary of the Interior of matters relating to Indian affairs; that the said F. M. Goodwin had at that time discussed with said Jackson Barnett the proposed gifts for which he had requested departmental approval; that as a result the said Goodwin was convinced that the said Jackson Barnett fully understood the nature, purpose, and effect of the gifts proposed and that he was of sufficient mental competency to dispose of this property. Based upon such conviction, so induced, the said F. M. Goodwin did approve of such disposition of said property."

Said answer further stated:

"But, further answering, these defendants aver that at the time that these transactions occurred and the approval of the Department of the Interior was given to these gifts the officials who passed upon the matter did believe and were of opinion, and now are, that the action taken by them in the matter was within their authority and discretion, and these defendants are likewise of that opinion and share that belief."

It should be noted in this connection that Secretary Work and Commissioner Burke probably were not subject to said suit, but they nevertheless voluntarily appeared and answered as above stated. It should be said, also, by way of explanation,
245 that Bailey, the Equitable Trust Company, and the mission society were named as defendants in that suit, but so far as the record shows no process ever was served upon them and they did not appear, and the suit was never pressed and subsequently was discontinued.

As late, however, as April, 1925, it appeared that we could look for no assistance in the prosecution of this suit from either the Department of the Interior or the Department of Justice, and certainly would receive no funds with which to carry on the suit.

In March, 1925, a bill was filed in the United States District Court for the Eastern District of Oklahoma in the name of Jackson Barnett "by his next friend and prochein ami R. B. Drake, chief United States probate attorney for the Five Civilized Tribes in Oklahoma," against Bailey, O'Hornett, and the county judge of Okmulgee County, in which it was set forth that Bailey "contrary to his duty in the premises" had subjected Barnett's estate to numerous litigations and attempted to encumber the same with costs by bringing this suit and others with reference to said gift of $1,100,000. The bill prayed, among other things, that Bailey be enjoined from having, holding, or asserting any control over Barnett's funds. The attorneys who filed that bill were M. L. Mott and L. O. Lyttle. Mr. Cochran and I appeared for Bailey and secured a dismissal of that suit.

In March, 1925, proceedings were commenced in the County Court of Okmulgee County to vacate Bailey's appointment as guardian and to have it adjudged that as to the funds here in
246 question the Secretary of the Interior was the paramount guardian of Jackson Barnett and had exclusive jurisdiction over the same. Those proceedings, also, were commenced by Mott and Lyttle in the name of Barnett through Drake as alleged next friend and as chief probate attorney, and the defendant mission society joined therein and asked the same relief.

In September, 1925, there was filed in the Supreme Court of Oklahoma a petition for a writ of prohibition, the plaintiffs in which were "R. B. Drake, chief probate attorney for the Five Civilized Tribes in Oklahoma; Jackson Barnett by R. B. Drake, chief probate attorney for the Five Civilized Tribes in Oklahoma, Jackson Barnett in his own proper person, and the American Home Baptist Mission Society, a corporation," and the defendants in which were "W. A. Barnett, county judge of Okmulgee County, and E. S. Bailey, purported guardian of Jackson Barnett as an incompetent." The attorneys who filed the petition were Mr. Lyttle, Mr. Rogers, and the firm of Lydick, McPherren & Wilson, the Lydick of that firm being a former judge of the Supreme Court of Oklahoma. The petition set forth the $1,100,000 gift, alleged that Barnett was of disposing mind and realized those who were entitled to his bounty and the effect of a gift upon his estate, alleged that Bailey "as guardian" had commenced this action to recover the $550,000 given to the mission society and had brought other suits to recover the $550,000 given to Mrs. Barnett, alleged that unless prohibited Bailey would continue to prosecute said suits" and harass and un-
247 lawfully interfere with the administration of such estate and said restricted funds by the Secretary of the Interior," and prayed, among other things, that the court find that "the exclusive power and jurisdiction to administer the fund herein involved lies in the Secretary of the Interior and the Department of the Interior of the United States of America," and that the County Court be prohibited from exercising jurisdiction with reference to the person and estate of Barnett, and that the court issue its writ of prohibition directing the county judge and Bailey "to cease interfering with the rest of the funds of the said Jackson Barnett now in the hands of the Secretary of the Interior or heretofore in the hands of the Secretary of the Interior of the United States of America."

While I never believed that, as a matter of law, a vacating of Bailey's appointment as guardian or the issuance of such a writ of prohibition would prevent the prosecution of this suit, it was obvious that the prevention of such prosecution was the object sought and that it would be contended by the defendants herein, or at least by the defendant mission society, that the prosecution of this suit by Bailey would cease if the guardianship were vacated or the writ of prohibition issued. As an indication of that it is sufficient to point out that the mission society would have no motive in joining in the

attack upon the validity of Bailey's appointment as guardian or in joining in the petition for a writ of prohibition except its desire to have the prosecution of this suit stopped. Furthermore, the pendency of said petition for a writ of prohibition and of said proceed-
248 ings to vacate Bailey's appointment were specially set up in this court in opposition to the motion which was made herein for an allowance of expense money for the prosecution of the suit. (See affidavits of Charles S. Fettretch and Harrison Tweed, verified October 26, 1925, now on file herein.) That the object of the petition for a writ of prohibition was to stop the prosecution of this suit is further shown by the fact that when the petition was presented and Mr. Cochran and I asked for a continuance of two weeks in order to prepare to oppose it the attorneys who presented the petition insisted that in the meantime no steps should be taken in this case, and in order to obtain the continuance Mr. Cochran and I were forced to agree that during that interim no proceedings in this suit would be taken. In consequence of that agreement the application for expense money herein was, in fact, delayed and was not brought on until after the agreement had been complied with.

It was likewise obvious that the attempt, both in the prohibition case and in the proceedings to vacate the guardianship, was to secure from the courts of Oklahoma an adjudication that the Secretary's authority over the funds here in question was paramount and exclusive and could not be reviewed or questioned in any court, and thus obtain a persuasive, if not controlling, precedent upon issues raised by the defendants in their answer to this suit. And if the writ of prohibition had been issued as prayed for, the Supreme Court of Oklahoma might have regarded further prosecution of this suit by Bailey as disobedience to such writ, even though the prosecution was by Bailey as next friend instead of by Bailey as guardian.

249 It thus was in the highest degree essential to the proper prosecution of this case that the petition for writ of prohibition and the proceedings to vacate the guardianship be vigorously opposed, and the services rendered in opposing them were thus essentially and in substance part of the prosecution of this case.

Those services were extensive and occupied a great amount of time, both for Mr. Cochran and myself from March, 1925, to February, 1927. In addition, we specially retained in the prohibition case the firm of ex-Judge Sharp, of the Supreme Court of Oklahoma.

In order that the court may see the vast amount of work done in litigation in Oklahoma I submit the following brief synopsys of those proceedings.

In opposition to the motion to vacate the guardianship Mr. Cochran and I prepared and filed a motion to remove Mr. Drake as next friend of Jackson Barnett for the reason that he was acting in the interests of Barnett's adversaries, namely, Anna Laura Barnett and the American Baptist Home Mission Society. That motion recited in detail the history of the transaction as disclosed by the

record in this case and consisted of about 20 typewritten pages. Mr. Cochran and I appeared in the County Court and argued this motion at length and write a brief in support of it. The argument lasted nearly an entire day. The County Court sustained our motion. The motion above referred to also included a demurrer to the action of Drake in so far as he appeared in his official capacity and the argument on that question was made at the same time, and the demurrer was sustained.

250 The County Court, having thus ousted Drake, appointed a member of the bar of Okmulgee County as guardian ad litem to investigate and report upon Jackson Barnett's alleged cause of action for the vacating of the guardianship. The guardian ad litem then took of the prosecution of the motion and a hearing was had before the County Court at which the guardian ad litem presented evidence in support of the alleged invalidity of the guardianship and Mr. Cochran and I presented evidence and argued in support of the validity. That hearing consumed an entire day, and the County Court denied the motion to vacate.

Mr. Lyttle then filed a new motion in the name of Jackson Barnett, praying for substantially the same relief as had been prayed for by Drake. In opposition to that motion Mr. Cochran and I prepared and filed a motion to dismiss upon the ground (a) that Barnett was incompetent to employ Lyttle as his attorney, and in addition to the adjudication then under attack had been adjudged incompetent in California in July, 1924, the validity of which latter adjudication was recognized by Mr. Lyttle; and (b) because the proceeding was instituted without the knowledge or consent of Jackson Barnett and in the furtherance of the interests of his adversaries. Mr. Cochran and I appeared and argued that motion and wrote a brief in support of it. The argument lasted approximately half a day. There was also a hearing at which the testimony of Mr. Lyttle was taken. Our motion was sustained.

After Drake was ousted the defendant mission society filed
251 a motion similar to the one filed by Drake and asked the same relief. In opposition to that motion Mr. Cochran and I prepared and filed a motion to dismiss upon the ground that the mission society had no legal standing to attack the validity of the guardianship proceedings, and also prepared a brief in support thereof. That motion also was argued orally by Mr. Cochran and me, and our motion was sustained.

Three appeals from the orders of the County Court were taken to the District Court of Okmulgee County, where, under the law of Oklahoma, the matters were triable de novo. One appeal was taken by Drake, one by Lyttle as alleged attorney of Barnett, and another by the guardian ad litem.

In the District Court Mr. Cochran and I prepared and filed motions to dismiss the appeals taken by Mr. Lyttle and by Mr. Drake. A hearing was had upon those motions, evidence was taken and

arguments were made. The hearing consumed practically an entire day, Mr. Cochran and I both participating. The District Court dismissed the appeals. That was in July, 1925.

From the orders of the District Court dismissing the appeals of Mr. Lyttle and Mr. Drake they appealed to the Supreme Court of Oklahoma. No appreciable amount of work was done in connection with those appeals to the Supreme Court until July, 1926. Before stating those services, therefore, I will narrate the services in the prohibition case, which extended from September, 1925, to July 1926.

The petition for writ of prohibition was filed as an original action in the Supreme Court of Oklahoma in September, 1925, as above stated.

252 The petition covered 81 printed pages, including exhibits.

Mr. Cochran and I prepared a motion to dismiss which covered 47 typewritten pages, including exhibits. We also prepared the response of the county judge, which covered 56 typewritten pages, including exhibits. The questions raised by the petition for prohibition were exceedingly numerous. Many of them were highly technical, but at the same time exceedingly novel and such as are not ordinarily met with in the usual course of practice. Others involved the very broad and complicated subject of the relationship of the County Courts of Oklahoma and the Secretary of the Interior in the administration of Indian affairs.

In order that the court may see the number and complicated character of the questions presented, I append hereto, as Exhibit A of this affidavit, a copy of the summary of the propositions as set forth in the brief which we subsequently submitted to the Supreme Court in opposition to the petition.

In October, 1925, there was an oral argument upon our motion to dismiss the petition, in which argument Mr. Cochran, Judge McCrory, Judge Sharp, and I all participated. The argument was had before the full bench of the Supreme Court of Oklahoma, and lasted for two days, which was most unusual in cases before that court. The counsel who appeared in support of the petition were Mr. Rogers, Mr. Lyttle, and ex-Judge Lydick. At the conclusion of the argument the court directed the filing of briefs. Mr. Cochran and I then prepared a brief for the defendants, with the assistance of Judge McCrory and Judge Sharp. That brief covered 260

253 printed pages. We also prepared a supplemental and reply brief of about 30 printed pages. After the briefs were filed there was a further oral argument before the full bench of the Supreme Court which lasted four hours and in which Mr. Cochran, Judge McCrory, and Judge Sharp and I all participated on behalf of the defendants; Mr. Rogers and Mr. Little and Judge Lydick on behalf of the plaintiffs. That second argument was had in April, 1926.

Between the first and second oral arguments before the Supreme Court there was a long series of motions and other interlocutory

proceedings. Drake withdrew from the case. The defendant mission society filed objections to his withdrawal and a protest against the withdrawal was filed in the name of Jackson Barnett by Mr. Lyttle. A reply to such objection and protest was prepared and filed by Mr. Cochran and myself and our associates, which reply included a brief. The California guardian petitioned for leave to intervene in the case, and Mr. Cochran and I and our associates prepared and filed objections thereto and a brief in support of our objections. Mr. Lyttle and Judge Lydick also made a motion for the appointment of a guardian ad liem for Jackson Barnett, and Mr. Cochran and I and our associates prepared and filed objections to that application, with a brief in support thereof. The plaintiffs in the case also moved to consolidate the cause with the two appeals from the District Court above mentioned, and Mr. Cochran and I and our associates prepared and filed a response to that motion, with a brief in support of our response.

The petition for the writ of prohibition was finally denied by the Supreme Court in July, 1926.

254 I return now to the further proceedings in the Supreme Court upon the appeals taken to that court from the District Court in the matter of vacating the guardianship. During the month of July, 1926, I wrote, with the assistance of Mr. Cochrane and Judge Sharp, a brief in opposition to those appeals, consisting of about 40 typewritten pages. In November, 1926, the Supreme Court handed down a decision reversing the lower courts and declaring the appointment of O'Hornett invalid because on order of the District Court had been entered in vacation instead of in term time. After the announcement of that decision I prepared and submitted, with the assistance of Mr. Cochran and Judge Sharp, a petition for re-hearing, and brief in support thereof, consisting of 100 printed pages. The preparation of such petition and brief, despite all my previous work upon the case, consumed three weeks. In order that the court may see the character of the questions involved in that case, I append hereto, as Exhibit B of this affidavit, a summary of the propositions as set forth in said last-mentioned brief.

While those proceedings were being carried on in the courts of Oklahoma, Mr. Cochran and I made further efforts to secure the assistance of the Department of Justice in the prosecution of this case, and in November, 1925, we went to Washington and spent a number of days in endeavoring to effect that object. At that time Attorney General Stone and Assistant Attorney General Wells both had retired from the department, and it became necessary to take up the matter practically anew with other officials. We collated

255 and presented documents and memoranda as to the facts and authorities as to the law and urged upon them what we conceived to be the duty of the department in the matter. While in Washington for this purpose we utilized the occasion of our nearness to New York for the purpose of coming here and conferring with Mr. Walter as to the prosecution of this case.

As a result of our efforts the Department of Justice finally intervened in this case and in the prohibition case in Oklahoma, and united with us in asking that the writ of prohibition be denied and that the gift here attacked be set aside.

We had every reason to believe that the right and standing of the United States to intervene in this case in opposition to the validity of the gift would be questioned, and subsequently turned out to be the fact; and that question, as well as the questions going to the merits of this case, necessarily had to be considered, and was considered and investigated in our conferences with the officials of the Department of Justice.

The assistance which the Department of Justice thereafter rendered in the proceedings in Oklahoma and in the prosecution of this case was helpful, and I want to record here on behalf of my associates and myself our personal appreciation of the friendly spirit of co-operation which has existed between us and the representatives of the department in Washington, in Oklahoma, and in New York. We have no desire to minimize the extent or importance of that co-operation. At the same time it must be said in fairness to ourselves that the real burden of going forward with the suit and pressing it to a successful conclusion has fallen upon us, as I
256 think the record and the proceedings at the trial will abundantly show to the court. And I have no hesitation in saying that if it had not been for the persistency of Mr. Cochran and myself in pressing the matter before them the Department of Justice never would have taken any action to recover the $1,100,000 or any part of it. Indeed, it is not too much to say that but for our activities the matter in all probability never would have been brought to the attention of the Department of Justice in such fashion that any cognizance of it would have been taken by any responsible official.

Referring again to my contract with Bailey already mentioned above, I desire to state that when the proposed contract was submitted to the County Court of Okmulgee County for its approval the percentage of the recovery to be paid as compensation for services was left blank, and the forty per cent now appearing therein was fixed by the court itself, and, as appears from the endorsement on the contract, the contract in its completed form was approved by that court. In this connection I further state that here is a statute in Oklahoma expressly authorizing contingent fee contracts for not exceeding fifty per cent of the recovery, and it was then and is now a usual and prevalent practice in Oklahoma for attorneys taking cases on contingent fees to stipulate for fifty per cent of the recovery. The forty per cent was fixed in this case because the amount involved was unusually large. It is proper to add, however, that at the time said contract was made no attack was expected upon the validity of the guardianship, nor was it contemplated that there would be any such litigation as that necessitated by the presentation of the

257 petition for a writ of prohibition. In short, the amount of work required in order successfully to prosecute this case has far exceeded what was anticipated at the time the contract was made.

In connection with the services above enumerated the following expenses have been necessarily incurred and actually paid by me or my firm:

(1)	Stenographer's fees for taking depositions	$726.19
(2)	Notary fees for taking depositions	50.75
(3)	Expenses of service subpœnas, fees, and mileage of witnesses	258.45
(4)	Certified copies of documents obtained for the purpose of offering in evidence in this case	78.75
(5)	Telegrams, telephones, postage, and expressage	67.64
(6)	Traveling expenses on 3 trips to Murkogee	17.75
(7)	Traveling expenses on trip to Tulsa	6.00
(8)	Traveling expenses on trip to Tulsa, Coffeyville, and Washington, D. C., in June, 1926, for the purpose of taking depositions	257.00
(9)	Services of local counsel in Coffeyville in serving subpœna upon McGugin, arranging for taking his deposition, and for use of office facilities, etc	25.00
(10)	Traveling expenses on trips to New York in October, 1926, and November, 1926, and additional trip to Washington in October, 1926, in connection with trial of this case	545.00
258 (11)	Traveling expenses on 9 trips from Henryetta to Oklahoma City in connection with the prohibition case and the appeal cases in the Supreme Court of Oklahoma	178.00
(12)	Traveling expenses on 27 trips from Henryetta to Okmulgee in connection with prohibition case and proceedings to vacate guardianship	38.00
(13)	Printing petition for re-hearing and brief in support thereof in appeal cases in Supreme Court of Oklahoma	75.00
(14)	Traveling expenses on trip to Washington and New York in January, 1925	380.00
(15)	Traveling expenses on trip to Washington and New York in November, 1925	265.00
(16)	Traveling expenses on trip to New York in August, 1927, in connection with this application for allowance	200.00
	Total	3,168.53

I kept no accurate record of the expenses enumerated as items (11) and (12), and I do not know the exact amount thereof, but I do know that the actual expenses represented by said items are in excess of the amounts stated.

259 All the expenses above enumerated were necessarily incurred and actually paid, and are reasonable in amount; and no part thereof has been paid except the $2,000 paid by Equitable Trust Company pursuant to the order herein of March 2, 1926. Items (1) to (10), inclusive, were directly and exclusively for the prosecution of this particular suit. Items (11), (12), and (13) were for the benefit of this case for the reasons above stated, and the nature of the proceedings to which those items relate is such that no reimbursement can be obtained in those proceedings. Item (14) was primarily for the benefit of this case, although upon that trip certain services in connection with the suit in the Supreme Court of the District of Columbia were performed. Item (15) was primarily for the benefit of this suit because that trip was made for the purpose of

securing the intervention of the Department of Justice in this suit, and actually resulted in bringing about such intervention as well as their intervention in the prohibition case.

RAYBURN L. FOSTER.

Sworn to before me this 24th day of August, 1927.

ETHEL JOHNES,
Notary Public, Kings County No. 152.

Certificate filed New York County No. 81.
New York County register's No. 9067.
Kings County register's No. 9053.
Commission expires March 30, 1929.

260 *Exhibit to affidavit of R. L. Foster*

Contract (referred to in affidavit of Mr. Foster)

This agreement, made and entered into on this 11th day of December, 1924, by and between E. S. Bailey, guardian of Jackson Barnett, an incompetent, party of the first part, and Hummer & Foster, a copartnership composed of R. B. F. Hummer and R. L. Foster, parties of the second part, witnesseth:

That whereas on the 29th day of April, 1912, Jackson Barnett was duly adjudged an incompetent by the County Court of Okmulgee County, Oklahoma, and Carl J. O'Hornett was duly appointed as the guardian of the person and estate of the said Jackson Barnett, who duly qualified as such guardian and continued to act in that capacity until the 13th day of June, 1924, at which time he resigned;

And whereas on the 13th day of June, 1924, E. S. Bailey was duly appointed by the County Court of Okmulgee County, Oklahoma, as the guardian of Jackson Barnett, an incompetent, and on the same day duly qualified as such guardian and is now the duly appointed, qualified and acting guardian of Jackson Barnett, an incompetent;

And whereas the said Jackson Barnett is a citizen of the Creek Nation and as such citizen of the Creek Nation was allotted the following described real estate located in Creek County, State of Oklahoma, to wit:

Southeast quarter (SE/4) of section five (5), Township seventeen (17) north, Range seven (7) east;

261 And whereas said premises were duly leased for oil and gas purposes by Carl J. O'Hornett, former guardian of Jackson Barnett, upon departmental form and which lease was duly approved by the county court of Okmulgee County and the Secretary of the Interior, wherein certain royalties were reserved for the oil and gas produced therefrom;

And whereas, pursuant to the terms of said lease, oil and gas wells were drilled upon said premises and large quantities of oil and gas produced and royalties were paid thereon as by the terms and con-

ditions of said lease to the superintendent of the Five Civilized Tribes, for the use and benefit of Jackson Barnett, an incompetent, which sums on and prior to the 15th day of December, 1922, were in excess of the sum of $1,100,000.00;

And whereas during the month of February, 1922, Anna Laura Lowe, together with accomplices, enticed and forced the said Jackson Barnett into an automobile and transported him to the States of Kansas and Missouri, and in each State the said Anna Laura Lowe entered into an alleged marriage relation with said Jackson Barnett, and since said time has continued to keep the said Jackson Barnett away from his habitation, his accustomed environment and the association of the members of his tribe, and from his guardian, and has kept him under the influence, duress, and restraint of herself and her counsel and associate;

And whereas, on or about the 15th day of December, 1922, a certain letter was written by the said Anna Laura Barnett, her
262 associates, or counsel, addressed to the Secretary of the Interior, purporting to be written by the said Jackson Barnett and requesting the Secretary of the Interior to give to Anna Barnett out of the estate of said incompetent the sum of $550,000.00 and to give to the American Baptist Home Missionary Society out of said estate the sum of $550,000.00, which said letter purports to be signed by the thumb mark of said Jackson Barnett;

And whereas the Secretary of the Interior or his assistant, presumably pursuant to said purported letter of Jackson Barnett, caused the sum of $550,000.00 to be delivered to Anna Barnett and the sum of $550,000.00 to be delivered to the American Baptist Home Mission Society, either in cash or in bonds, into which the said Secretary of the Interior had theretofore invested the funds of the said Jackson Barnett, and said funds and said bonds being taken out of the estate of said incompetent in the hands of the Secretary of the Interior or the Superintendent of the Five Civilized Tribes;

And whereas it is believed that said mental incompetent was incapable of understanding the letter aforesaid or the transactions therein involved and was under the undue influence, duress, and restraint of said Anna Laura Barnett and was thereby induced to affix his thumb mark to said instrument;

And whereas the action of the Secretary of the Interior in surrendering said funds pursuant to said letter in the absence of the consent of the guardian of said Jackson Barnett and without
263 an order of the County Court of Okmulgee County, Oklahoma, regardless of the question of whether or not the said incompetent understood the said letter and the transactions therein involved and regardless of whether he was under the influence, duress, and restraint of the said Anna Barnett, was without authority of law, and said funds were illegally and unlawfully extracted from the estate of said Jackson Barnett;

And whereas the sum of $200,000.00 of said funds are now in deposit in the Riggs National Bank, of Washington, D. C., pursuant to a certain trust agreement between the said Anna Laura Barnett and Jackson Barnett, whereby the said Jackson Barnett is to receive a certain income therefrom during his lifetime and the sum of $550,000.00 is on deposit in the Equitable Trust Company of New York City, pursuant to a trust agreement between The American Baptist Home Mission Society and Jackson Barnett, whereby the said Jackson Barnett is to receive a certain income from said funds during his lifetime and the balance of said funds, in the amount of $350,000.00 have been distributed between Anna Barnett and her counsel;

And whereas the party of the first part is without sufficient funds belonging to said estate to pay the necessary fees for legal services which will be required in recovering said funds due to the fact that said party of the first part has been unable to secure the cooperation and assistance of the Secretary of the Interior or the Superintendent of the Five Civilized Tribes, who are withholding
264 from the party of the first part all sums of money in their possession belonging to said incompetent and are refusing to advance any sum of money or to take any action to recover said funds;

And whereas the party of the first part desires to take such action as may be advisable for the recovery of said funds and has been duly authorized by the County Court of Okmulgee County by an order entered therein on the 11th day of December, 1924, in probate cause No. 1018, to take such action as he deems advisable for the recovery of said funds or so much thereof as can be found or traced into other property, and has been authorized to employ counsel;

Now, therefore, the party of the first part, by and with the consent of the County Court of Okmulgee County, Oklahoma, does hereby employ the parties of the second part for the purpose of taking such action as they may deem advisable for the recovery of said funds, and for that purpose to interview the various interested parties and to file such suit or suits in such courts and in such States and against such persons as said attorneys may deem advisable, giving said attorneys full authority to institute suit in the name of the party of the first part and to prosecute the same to completion, giving said parties of the second part full and complete authority in the management of said actions, provided, however, that no compromise of said action shall be made except by and with the consent of the party of the first part and the county court of Okmulgee County, Oklahoma. Parties of the second part are further authorized to employ such other legal counsel as they may deem advisable, at their own expense.

265 In consideration of the services to be rendered by the parties of the second part the party of the first part does hereby agree

to pay to said parties of the second part a sum equal to forty per cent of such amount as may be recovered by virtue of their efforts, whether by final judgment, or by compromise, or otherwise, and the party of the first part does hereby transfer, assign, convey, and set over unto the parties of the second part, their heirs and assigns, forty per cent of the causes of action of the said Jackson Barnett for the recovery of said sums or any part thereof.

Party of the first part further agrees to advance the necessary court costs in the filing of said actions, and agrees to advance or to reimburse parties of the second part for their reasonably necessary expenses in performing their duties under this contract to such an extent and at such times as funds belonging to said incompetent may come into the hands of the party of the first part.

Parties of the second part hereby accept the employment upon the terms and conditions as above set out and agree to use due diligence in the prosecution of the causes of action of the said Jackson Barnett to final termination.

This agreement shall be binding upon the estate of Jackson Barnett, his heirs, executors, administrators, trustees, and assigns.

In witness whereof the parties have hereunto set their hands the day and year above written, concurrently with the order of the
266 County Court of Okmulgee County, Oklahoma, authorizing the execution of this contract.

E. S. BAILEY,
Guardian of Jackson Barnett,
Party of the First Part.

_____,
R. L. FOSTER,
Parties of the Second Part.

STATE OF OKLAHOMA,
Okmulgee County, ss:

Before me, the undersigned, a notary public in and for said county and State, personally appeared E. S. Bailey, R. B. F. Hummer, and R. L. Foster, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal this day of December, 1924.

_____, *Notary Public.*

My commission expires

This contract examined and approved by the county court of Okmulgee County, Oklahoma, concurrently with the order of this court of this date, authorizing the execution of the same.

W. A. BARNETT, *County Judge.*

[Seal of Okmulgee County Court.]

267 *Exhibit A, attached to affidavit of Mr. Foster*

Summary of propositions set forth in brief in opposition to petition for writ of prohibition in Supreme Court of Oklahoma

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Congress has conferred upon the County Courts of Oklahoma full and competent jurisdiction of the guardianship of minors and incompetents, whether Indians, freedmen, or otherwise; and such courts have jurisdiction of the lands and property of full-blood incompetent Indians, whether such lands or property be so-called restricted or unrestricted; and the Secretary of the Interior is without authority to promulgate any rule or regulation depriving the County Courts of such jurisdiction 171

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278 *Exhibit B, attached to affidavit of Mr. Foster*

Summary of proposition set forth in brief on rehearing in Supreme Court of Oklahoma in proceedings relative to vacating the appointment of the guardian

I

The court erred in holding that the District Court erroneously dismissed the appeal of L. O. Lyttle on behalf of Jackson Barnett for the following reasons:

A. Because Barnett is in fact incapable of taking care of himself and managing his property as evidenced by the order appointing guardian in California, to which this court under the Constitution is bound to give full faith and credit; Barnett is therefore incapable of conducting this litigation, and must be represented by next friend or guardian ad litem. The County Court having designated W. C. Alley as guardian ad litem, L. C. Lyttle was without authority to take any action on behalf of Barnett.

B. Except as any person may bring an action as next friend of an incompetent person, subject to the power of the court over such next friend—to remove him or to stay the action—there is no authority for L. C. Lyttle to represent Barnett, his sole authority being derived from a power of attorney executed by Barnett, which is void under the laws of California and of Oklahoma, it having been made after the appointment of guardian in California.

279 II

The court manifestly erred in deciding the case upon issues not presented to the trial court and which could only arise upon the

hearing of the case upon its merits, to wit: The validity or invalidity of the guardianship. The only question properly before this court was the validity of the order of the District Court dismissing the appeals of L. O. Lyttle and H. B. Drake on behalf of Jackson Barnett, which was specifically brought to the attention of the court in the brief of defendant in error at pages 3 and 16 thereof. In passing upon the validity of the guardianship, this court accepts as conclusive that portion of the records attached to the motion to vacate the appointment of guardians for Jackson Barnett without affording defendant in error an opportunity to plead or prove other portions of the record in said guardianship proceedings, or to show by other competent evidence all that was had and done in the course of said probate proceedings.

D.

III

Assuming, for the purpose of argument, that this court has jurisdiction on this appeal to pass upon the validity or invalidity of the guardianship, the court erred in its opinion in holding that the order of September 5, 1912, was made in vacation for the following reasons:

A. Because the opinion is based upon evidence which does not appear in the record. The court states in its opinion that the District Court adjourned on August 7, 1912, and that thereafter
280 the clerk's journal showed orders made "in vacation"; the record does not show that the District Court adjourned on August 7, nor does it show the words "in vacation" on the clerk's journal.

B. Even though the record in this case were the same as the record in the prohibition case (No. 16,784, in this court, which record the court has undoubtedly confused with the record in this case), still the court erred in holding that the order of September 5, 1912, was made in vacation for the following reasons:

1. The motion to vacate the guardianship having been filed more than three years after the order appointing guardians was made, cannot be sustained unless the invalidity of the guardianship affirmatively appears from the face of the record—the judgment roll. If it is necessary to resort to any evidence other than the judgment roll to show the invalidity of the guardianship, the motion to vacate cannot be sustained.

2. The judgment roll (to which alone the court may look to ascertain whether the judgment in this case is void) consists of the record required to be kept under the provisions of section 686 and 688, inclusive, C. C. S., 1921, which consists of the petition, the process, the return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. This does not include the clerk's notation "In vacation" at the top of the page of the journal, even though made to appear in the case made.

281 3. In support of the judgment of the District Court of September 5, 1912, every possible presumption should be indulged to uphold it. It will be presumed that all facts and conditions necessary to uphold the judgment existed unless such facts or conditions are affirmatively negatived by the record. It follows that inasmuch as the judgment roll does not show affirmatively that the order was made "in vacation," it is conclusively presumed that it was made in open court, in term time.

4. The District Court having properly convened at the beginning of the term continued in session until the next regular term of court, unless adjourned sine die. The order of August 7 is not an adjournment sine die, and hence the court was in session on September 5, 1912.

5. Because the District Court was in fact in session on September 5, 1912, which can and will be proved if this court will permit the case to be tried de novo in the District Court as the statute requires.

IV

The court erred in holding that the District Court had no jurisdiction to enter the order of September 5, 1912, on account of the fact that the so-called "mandate" of the District Court had been filed and recorded in the County Court on July 1, 1912, for the following reasons:

282 A. Because it is not shown that any valid order of the District Court of June 24, 1912, was ever rendered or entered in the District Court, and the purported copy thereof as filed in the County Court is not a copy of an order of the District Court. This for the reason that the only evidence in the record of such purported order is a purported copy thereof shown on page 16 of the case made, which does not show that the original was ever filed or recorded in the District Court, and it is therefore a nullity.

B. Because the copy of the purported judgment of June 24, 1912, as filed in the County Court, is not a certified copy thereof as required by said order.

C. Because the statute does not authorize the issuance of a mandate by the District Court on appeal from the County Court where the order of the County Court is reversed in its entirety and where there is no judgment left to execute. The mandate is not required to show that the order of the County Court has been vacated because it is vacated when the appeal is taken.

D. Because if the record shows a valid order of the District Court entered on June 4, 1912, and if the uncertified copy thereof as filed in the County Court operates as a mandate the same was vacated and recalled by the order of September 5, 1912.

283 In United States District Court

[Title omitted.]

Affidavit of Almond D. Cochran in support of application for allowances

STATE OF NEW YORK,
County of New York, ss.:

Admond D. Cochran, being first duly sworn, deposes and says: I reside in Okmulgee, Oklahoma. I was admitted to the bar of that State in 1908, and have been engaged in the practice of the law there since that date. I am also a member of the bar of the State of Missouri and of the bar of the Supreme Court of the United States. At all the times hereinafter mentioned I was a member of the firm of Cochran & Ellison, which firm recently was dissolved by the death of Mr. Ellison.

In November, 1924, Mr. R. L. Foster of the firm of Huinmer & Foster, attorneys of Henryetta, Oklahoma, legal representatives of Elmer S. Bailey, at that time the newly appointed guardian of
284 Jackson Barnett, incompetent, consulted my firm with reference to Barnett's alleged gift of $1,100,000 of Liberty loan bonds set forth in the pleadings and evidence herein and with respect to the bringing of suits for the recovery of those bonds or their proceeds, and arranged for the assistance and cooperation of my firm in bringing and prosecuting such suits. It was recognized and agreed that compensation for services in so doing would have to be contingent upon success because, as pointed out in the annexed affidavit of Mr. Foster, there was no other means of obtaining such compensation.

From that time until January, 1927, a large part of my time has been devoted to the task of recovering those funds. The various litigations involved in that undertaking, including suits for the recovery thereof and proceedings instituted by our opponents in opposition thereto, may be briefly enumerated as follows:

1. This suit relating to $550,000 thereof.

2. A suit in the Supreme Court of the District of Columbia against the Riggs National Bank to recover $200,000 thereof; being a part of the $550,000 given to Mrs. Barnett;

3. A suit in the United States District Court for the district of Kansas against Harold McGugin to recover $150,000 thereof, being the amount believed to have been transferred to McGugin out of the $550,000 given to Mrs. Barnett;

4. A suit in the District Court of Okmulgee County, Okla-
285 homa, against M. L. Mott, to recover the $15,000 which he admits having gotten out of the $550,000 given to Mrs. Barnett;

5. A suit in the United States District Court for the District of California against Mrs. Barnett to impress a trust upon certain real estate in which it is believed that she invested a part of the balance given to her;

6. A suit brought in this court by Mrs. Barnett in the name of Jackson Barnett by herself as his prochein ami to establish the

validity of the gift to the defendant Home Mission Society and enforce the trust concerning the same;

7. A suit brought in the Supreme Court of the District of Columbia by Mrs. Barnett to enforce the trust under which the Riggs National Bank held $200,000 of the bonds given to her and to establish the validity of the gift to her;

8. A suit brought in the United States District Court for the Eastern District of Oklahoma in the name of Jackson Barnett by R. B. Drake, chief United States probate attorney, as alleged next friend, the object of which in substance was to enjoin the prosecution of said suits for the recovery of said $1,100,000;

9. The prohibition case in the Supreme Court of Oklahoma, more particularly described in the affidavit of Mr. Foster; and

286 10. The several proceedings to vacate the guardianship, which also are more particularly described in the affidavit of Mr. Foster.

None of the litigations above mentioned has been tried except this suit and the prohibition case and the proceedings to vacate the guardianship, and the suit against McGugin has been dismissed without a trial, and the property sought to be reached by the suit numbered "5" above has been sold under mortgage foreclosure, as I am reliably informed and verily believe. Nothing has been thus far recovered, therefore, and the prospect of recovering anything except the $550,000 involved in this suit and the $200,000 held by the Riggs National Bank is remote and discouraging. In the suit to recover the $200,000 held by the Riggs National Bank it was necessary to employ local counsel in Washington, and such counsel have been employed upon an agreement for compensation to be paid out of the recovery therein.

Just about the time my firm was retained, some persons, not in any way connected with Bailey or Mr. Foster, or Judge McCrory or myself, and wholly without our knowledge, made certain charges and accusations against Commissioner Burke with reference to this distribution of $1,100,000 of Barnett's funds and other alleged malfeasances of Commissioner Burke in other Indian matters, and a hearing was had with respect to those charges before a subcommittee of the House of Representatives' Committee on Indian Affairs in January, 1925. Up to that time about all that Mr. Foster and

287 I had been able to learn with reference to this gift was the fact that it had been made and approved by the Secretary without the knowledge or consent or concurrence of the County Court or of the guardian, and that the Secretary had refused to vacate his approval or assist in recovering the funds, or to permit the use of any of the funds of Barnett for that purpose. As to how and by whom the distribution had been engineered we were wholly in the dark. In an effort, therefore, to learn the facts in that regard, Mr. Foster and I attended the hearings before the congressional committee in Washington in January, 1925, and while in Washington on that occasion we also made some independent investigations.

During the same visit to Washington I personally interviewed Secretary of the Interior Work and laid the matter before him and renewed the request for funds with which to prosecute litigation

for the recovery of the money. The request was also submitted in writing both to Commissioner Burke and to Secretary Work, and the request was refused.

During the same visit to Washington Mr. Foster and I prepared and sent to the Attorney General of the United States a long letter reviewing the facts as we had then learned them and presenting our theory of the law, and requesting the assistance of the Department of Justice in the proposed litigation for the recovery of the funds. We also had a number of personal interviews with Assistant Attorney General Wells and other officials of the Department of Justice. We persistently and earnestly endeavored to impress upon them the illegality of the gift and the duty of the
288 Department of Justice to assist us in our efforts to have the same set aside. It was quite apparent that these officials of the Department of Justice were extremely reluctant to "lock horns" with the Department of the Interior and take a position which involved the condemnation of an act of that department, particularly as the Department of the Interior still was insisting upon the propriety and legality of its act and pursuing a policy which was utterly opposed to any attempt to have the gift annulled; and during that visit we received no assurance that any assistance or cooperation from the Department of Justice in our efforts to secure an annulment of the gift would be forthcoming.

While in Washington on that occasion Mr. Foster and I came over to New York. Judge McCrory, who had been subpœnaed to attend the Washington hearings and testify as a witness, accompanied us. We interviewed some of the officers of the defendant mission society and also their counsel, Mr. Fettretch, in an effort to secure a return of the $550,000 amicably and without litigation. We also interviewed the attorneys for the Equitable Trust Company with the same end in view. We were unsuccessful, and we thereupon consulted Mr. Carroll G. Walter, of the firm of Patterson, Eagle, Greenough & Day, with whom I previously had been associated in other litigation, and retained that firm for the purpose of bringing this suit.

No assistance or indication of cooperation had been received from the Department of Justice as late as October, 1925. On the contrary, there had been filed in the suit designated as
289 "Number 6" above an answer which apparently indicated a disposition on the part of the Department of Justice to aid the Department of the Interior in upholding the validity of the gift. That answer is more particularly described in the annexed affidavit of Mr. Foster.

In November, 1925, Mr. Foster and I again went to Washington and had further conference with various officials of the Department of Justice with reference to the setting aside of the gift here in question in an effort to get that department to assist us in the prosecution of the litigation then pending. Those conferences lasted for

approximately two weeks. We again presented the facts and the law, argued as to their effect, urged the duty of the department to assist us, and point out the tremendous opposition with which we were being met, the great difficulty which necessarily inheres in an effort to establish the illegality of an act of a great department of the Government such as had been taken by the Department of the Interior in this case, and the assistance which the Department of Justice could give.

Shortly thereafter the Department of Justice did intervene in this case and also in the prohibition case of Oklahoma.

In December, 1925, L. O. Lyttle, one of the attorneys who has appeared herein as counsel for the defendants, presented to the Judiciary Committee of the United States Senate an elaborate "protest" or "objections" to the confirmation of B. M. Parmenter as Assistant Attorney General, which protest or objections he
submitted as coming from Jackson Barnett and signed in the
290 name of Jackson Barnett. In that document Mr. Lyttle, in
the name of Jackson Barnett, charged that Mr. Parmenter was guilty of maladministration in office because he had directed or procured the withdrawal of R. B. Drake from the prohibition case, which act, it was therein claimed, would tend to prevent an adjudication establishing the validity of these gifts. Being conversant with the facts involved I went to Washington and assisted Mr. Parmenter in meeting the charges, which he did with complete success. While those services, which consumed about a week of time, may be somewhat remote from this case, I think the matter worthy of mention in order that this court may see the extreme length to which our opponents went in their attempts to prevent a fair and proper prosecution of this suit.

From about February 25th to the middle of March, 1926, I had almost daily conferences with various officials of the Department of Justice in Washington with reference to the evidence to be adduced in support of the prosecution of this case, and on March 10, 1926, I came over to New York and had a conference with Mr. Walter with respect thereto.

In May, 1926, I spent a number of days in examining copies of the letters and documents which had been obtained from the files of the Department of the Interior, and during the same month I furnished to Assistant Attorney General Parmenter at his request a detailed statement of what we expected to develop by means of the depositions which were then in contemplation.

In September, 1926, I went to Muskogee, Oklahoma, and in company with Mr. Foster had an interview with Jackson Barnett.
291 During the months of October, November, and December, 1926, I was in Washington continuously, with the exception of several trips over to New York to confer with Mr. Walter and one or two very short trips back to Oklahoma. Although I had other business in Washington during that period, I had almost daily conferences with officials of the Department of Justice with reference

to the preparation for the trial of this case, the conduct of the trial, and the preparation of the briefs to be submitted on behalf of the plaintiff and on behalf of the United States.

I respectfully ask the court to note that this affidavit is supplementary to the affidavits of Mr. Walter and Mr. Foster hereto annexed. In order not to burden the court with a further detailed recital of all the proceedings in the case and of the services rendered in its prosecution, I refrain from making a more detailed statement of my services as to those matters which are covered in those affidavits. Throughout the prosecution of the case I worked and collaborated with Mr. Foster and Mr. Walter both orally and by correspondence.

In connection with my services the following expenses have been necessarily incurred and actually paid by me or my firm:

(1) Traveling expenses on 11 trips from Okmulgee to Oklahoma City in connection with the prohibition case and the proceedings to vacate the guardianship and for conferences with Special Assistant Shelby	$200.00
292 (2) Traveling expenses on trip to Washington and New York in January, 1925	350.00
(3) Traveling expenses on trip to Washington and New York in November, 1925	325.00
(4) Traveling expenses on 5 trips from Washington to New York	150.00
(5) Telegrams, telephones, and postage	40.00
(6) Traveling expenses on trip to New York in August, 1927	200.00
Total	1,265.00

I have kept no record of most of the foregoing items of expense, and I do not know the exact amount thereof, but I do know that the actual expense is in excess of the amount stated, and that the amounts stated were necessary and were actually paid, and are reasonable in amount. No part thereof has been repaid.

ALMOND D. COCHRAN.

Sworn to before me this 24th day of August, 1927.

ETHEL JOHNES,
Notary Public, Kings County No. 152.

Certificate filed New York County, No. 81; New York County register's No. 9067; Kings County register's No. 9053.
Commission expires March 30, 1929.

293 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Response of United States to application for allowances

Response to the application of the attorneys employed by Elmer S. Bailey for an allowance out of the property of Jackson Barnett for their services as counsel and for their disbursements

Comes now the intervenor herein, United States of America, by its counsel of record and for its response to the application of Patter-

son, Eagle, Greenough & Day, Hummer & Foster, Cochran & Ellison, and McCrory & Monk, attorneys employed by Elmer S. Bailey in the prosecution of this suit for an allowance out of the property described in the decree herein for their services and disbursements, and objects to the making of such allowance for the following reasons:

294 1. Because Jackson Barnett is a full-blood restricted Indian of the Five Civilized Tribes in Oklahoma, and the property and money out of which such allowance is sought is restricted against alienation, except with the approval of the Secretary of the Interior of the United States of America.

2. Because the property described in the decree of the court is subject to restrictions imposed thereon by Congress by the act approved May 27, 1908, 35 Stat. 312; and by reason of the provisions of said act is not subject to alienation, contract to sell, power of attorney, or any other encumbrance prior to April 6, 1931, unless done with the approval of the Secretary of the Interior of the United States of America.

3. Because the Secretary of the Interior of the United States of America is entitled under the decree of the court herein to the return and custody of said property, undiminished by the payment of an allowance of counsel fees.

4. Because the interests of Jackson Barnett were represented in this suit by the United States of America by its counsel acting under and by the direction of the Attorney General of the United States.

B. M. PARMENTER,
Assistant Attorney General.
CHARLES B. SELBY,
Special Assistant to the Attorney General,
CHARLES H. TUTTLE,
United States Attorney.
NAT M. LACY,
Special Assistant to the Attorney General.

295 In United States District Court

[Title omitted.]

Affidavit of Nat M. Lacy on application for allowances

DISTRICT OF COLUMBIA, *ss:*

Comes now Nat M. Lacy, who, being first duly sworn, deposes and says:

I have represented the United States in the above-entitled cause as counsel for the Government as Special Assistant to the Attorney General of the United States. The files of the Department of Justice in this matter were submitted to me on the 15th day of October, 1925, and the matter was assigned to me for attention. Thereafter, in

connection with other counsel of the Department of Justice, I prepared an application on behalf of the United States to intervene in this suit and caused the same, with a petition of intervention of the United States of America, to be filed in this court.

296 This petition was filed, as shown by the records, on the 5th day of December, 1925, and later the court sustained the application of the United States to intervene and ordered the petition of intervention filed.

Prior to the filing of this application and petition I conferred with Mr. Allen D. Cochran and Rayburn L. Foster, as well as with other attorneys and my superior officers in the Department of Justice, relative to the case and the action to be taken by the Government therein. A suggested petition of intervention was prepared by Mr. Cochran and Mr. Foster and given consideration before the petition was finally drawn and filed. The questions involved in the case and the importance of the matter demanded and were given exhaustive examination and attention. I prepared a brief in support of the Governmen's application to intervene and caused the same to be filed. Later, and after the granting of the Government's application to intervene in the case, I made a trip to Oklahoma to confer with Charles B. Selby, Special Assistant to the Attorney General, who had also been assigned to the case by the Attorney General, and while there Mr. Selby and I prepared a brief in the case of R. B. Drake, Chief Probate Attorney for the Five Civilized Tribes, et al. v. W. A. Barnett, County Judge of Okmulgee County, Oklahoma, and E. S. Bailey, wherein the plaintiff sought a writ of prohibition against the county judge and E. S. Bailey to compel them to cease interferring with the funds and property of Jackson Barnett, and in which case the United States appeared resisting the issuance of the writ.

297 The evidence in this case taken by deposition was taken when I was in California, and Mr. Charles B. Selby, Special Assistant to the Attorney General, appeared for the United States in the taking of those depositions.

During the months of May, June, and part of July, 1926, while I was in California, I was requested from time to time by the Department of Justice to furnish authorities and give my advice on various phases of the case as it developed.

Later I appeared at the trial of the case in New York and assisted Mr. Thomas J. Crawford in the presentation of the Government's case and contentions before the court and later assisted Mr. Selby in the preparation of the brief filed on behalf of the Government.

In connection with the preparation and trial of this case and the various proceedings connected with it prior to the trial I read the files of the Department of Justice, documents, and records of the Interior Department introduced in evidence in the case, and the testimony of witnesses in the case taken by deposition, and spent a great deal of time in so doing and in familiarizing myself with the evidence in the case and the questions of law involved.

This affidavit is supplemental to the affidavit of Mr. Charles B. Selby, with whom, throughout my connection with the case, beginning soon after the application and petition of intervention were filed herein, I worked and collaborated, both by correspondence and personal contact. I also co-operated with the attorneys for the next friend, Elmer S. Bailey, so far as the position taken by the
298 Department of Justice agreed with the contentions which they were making, but at all times I insisted that the recovery must be on the intervening petition of the United States to return the funds to the custody and control of the Secretary of the Interior.

I was in California when the amended petition of intervention was prepared and filed and performed no services in connection with its preparation.

NAT M. LACY,
Special Assistant to the Attorney General.

Subscribed and sworn to before me this 15th day of December, 1928.

GRACE MURPHY, *Notary Public.*

My commission expires October 13, 1928.

299 In United States District Court

[Title omitted.]

Affidavit of Charles B. Selby on application for allowances

UNITED STATES OF AMERICA,
District of Columbia, ss:

In re application of Carroll G. Walter et al. for allowance of attorneys' fees

I, Charles B. Selby, being first duly sworn, depose and say:

That since the 24th day of November, 1925, I have acted in the capacity of special assistant to the Attorney General of the United States, under appointment and direction of the Attorney General of the United States, made and entered as of said date; that from said time I have, under direction of the Department of Justice, given special attention to and participated in the above-entitled proceeding in the above-designated court on behalf of the Government of the United States; that also in connection therewith, Hon.
300 Nat M. Lacy, special assistant to the Attorney General, and George P. Barse, formerly departmental attorney, participated in the preparation and conduct of said cause, representing the Government's claim under its bill or petition of intervention filed therein; that said Special Assistant Nat M. Lacy presented the Government's motion to intervene and appeared in court in argument in support thereof, said motion being sustained and leave so

granted the Government about January 29, 1926; that in connection with said Special Assistant Nat M. Lacy I devoted some ten days in preparation of brief in support of said application.

That in April, 1926, said George P. Barse and myself prepared and caused to be filed an amended petition of intervention on behalf of the Government, which pleading now forms a part of the record in this cause and a part of the files of said cause in this court; that in the preparation of said amended petition some two months' time was devoted to an investigation of the law applicable to the case, as well as to the evidence then at hand. That during said period of time and in preparation of the above cause I made an examination of the record testimony taken by the sub-committee of the Committee on Indian Affairs of the House of Representatives, taken in its investigation of Indian affairs, particularly with reference to that part thereof involving the handling of the funds and management of the affairs of Jackson Barnett, whose funds were involved in this cause, as well as also examined innumerable reports of the bureau of investigation of the Department of Justice touching
301 the same subject-matter, as well as records and copies of records involving the same in the Department of the Interior and Department of Justice in the city of Washington, as well as from the office of the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, said subject matter of examination covering a period of some five years; these matters all were necessary to be done in order to properly prepare the Government's case both on the facts and the law. The law questions presented were innumerable and more or less novel because of the peculiar situation of the case, with all of which the court is well advised.

In May, 1926, I caused notices to issue for the taking of depositions of witnesses on behalf of the Government in the case, which notices covered largely the same witnesses and provided for the taking of testimony at the same times and places as are set forth and mentioned in the affidavit of Carroll G. Walter, filed in support of said application, to which reference is made for the purpose of brevity; that during substantially all of said period up to October, 1926, I was engaged in analyzing the evidence and in further briefing the law of the case, at which time Jackson Barnett being then in Oklahoma, and the cause being set for trial on the 15th day of October, and desiring the presence of Jackson Barnett before this court in the city of New York, and having determined that under the law the presence of Jackson Barnett could be required before said court, I requested the Department of Justice to direct the district attorney of the Southern District of New York to procure the issuance of proper writ by the court directed to the marshal
302 of the Eastern Federal District of Oklahoma to produce said Jackson Barnett before said court at said trial, which writ having been issued and placed in the hands of the marshal for said Oklahoma District, I procured an order from the District Court of

the United States for the Eastern District of Oklahoma in aid of said New York court writ, commanding said marshal to forthwith cause the said Jackson Barnett to be produced before this court in the city of New York at a time stated, which said writ was duly executed in accordance with the directions thereof; that I thereupon appeared in the Department of Justice in the city of Washington and after further time devoted to preparation for the trial of said cause until about the 25th of October, the date to which said cause was continued, and then went to New York City, where I further conferred with Assistant United States Attorneys Crawford and Sylvester in preparation for the trial of said cause, the same, however, being then continued until about the 15th of November, following. I again, in connection with Special Assistant Nat M. Lacy, appeared in the trial of the cause in New York City, beginning November 16th and continuing to the close of the 24th day of said month; that thereafter, in connection with said Special Assistant Lacy, I devoted some three weeks in the preparation of the brief on behalf of the Government in said cause, consisting of one hundred ninety-nine pages, which was printed, and thereafter filed with his honor, John C. Knox, the judge before whom said cause was tried; on August 9, 1927, Judge Knox rendered an opinion holding
303 the gifts invalid and ordering restoration thereof to the Secretary of the Interior. (See 21 Fed., 2 S., 325, 332.) In February, 1928, defendant mission society served and filed notice of appeal from the judgment of Judge Knox, but the trust company failed to join, and no severance was had, and the Government, as well as the plaintiffs filed their several motions to dismiss the attempted appeal, and in connection therewith I devoted some four or five days in the preparation of authorities and prepared a memorandum thereof and forwarded to the Assistant District Attorney in New York for use under the Government's motion to dismiss said appeal. On May 7, 1928, the Circuit Court of Appeals sustained the motions to dismiss the attempted appeal (see 26 Fed., 2S., 350, 354); that thereafter, and on defendant mission society's petition for writ of certiorari in the Supreme Court of the United States, the Government, through Solicitor General William D. Mitchell, Assistant Attorney General B. M. Parmenter, and Special Assistant E. E. Danley, prepared and filed briefs in opposition to said petition. That throughout the entire case the position of the Government and the position of the plaintiff were substantially the same, except the one difference that the plaintiff sought a surrender of the funds in question to the guardian of the said Jackson Barnett under the laws of the State of Oklahoma, on the theory that the releasing of the funds in question by the Secretary constituted a removal of the restrictions against the same, while the Government's position to the contrary was that the said release of said funds by the Secretary of the Interior was unauthorized as a matter of law, because of the
304 mental incompetency of said Jackson Barnett, and therefore that the same should be surrendered to the Secretary of the

Interior. The depositions and all evidence taken on behalf of the plaintiff and the Government were in effect and by understanding, taken jointly by the plaintiff and by the Government; many of the witnesses, whose depositions were taken at Henryetta and Tulsa, were procured by the plaintiff, while the major part of the documentary evidence offered in the case was procured by the Department of Justice and representatives of the bureau of investigation of that department; that the evidence so taken was submitted on behalf of the plaintiff's petition and of the Government's petition or bill of intervention.

That H. F. Arterberry, special agent of the bureau of investigation, in advance of the taking of the depositions in Oklahoma, devoted some ten days to conferring with the greater part of the witnesses whose depositions were taken; that representatives from the bureau of investigation in Los Angeles in connection with the United States Attorney at Los Angeles, devoted a great amount of time in gathering evidence in California were the Barnetts had gone after Mrs. Barnett received a part of the bonds in question, said investigation including an investigation into the matter of the appointment of the California guardian, and the handling of the funds thereby, coming into the hands thereof, belonging to said Jackson Barnett, as well as investigating and tracing the funds of the said Barnett; that in addition thereto the agents of said bureau in Washington, D. C., devoted a great amount of time in investigating
305 the manner in which the parties conducted the preliminaries of the transaction in question, leading up to the distribution of the bonds in question, as well as conducting investigations in the city of New York, in Kansas City, and in the State of Kansas as to the connection of the involved parties in the matter of the disposition of said bonds, as well as to their acts in carrying out the plan of the alleged wife of Jackson Barnett, and Harold C. McGugin, of Coffeyville, Kansas, as well as devoted a large amount of time to investigating the operations of said parties covering a period of some two years or more in Oklahoma, prior to the making of said pretended gifts; that affiant devoted a large part of his time to an analysis of the reports of the various agents of the bureau, as above mentioned, touching their said investigations of the case and in briefing the law questions involved, while the said G. P. Barse, departmental attorney in the Department of Justice of Washington, during said period of time, largely supervised and directed the investigations in Washington and in New York, and also devoted a large amount of time in connection with affiant in the briefing of the case in New York and in the companion cases thereto in Kansas and in California, and who largely supervised and directed the above activities from the Department of Justice in Washington, and who also devoted a great deal of time during said period in briefing the legal questions that arose from time to time and became involved in said New York pr'cedure and points that were likely to be raised in the

New York trial; that in the preparation of all of the Govern-
306 ment's amended bills in the New York case and the Washing-
ton case, the same were drawn as a result of extended conferences largely between the said G. P. Barse and affiant in harmony with their view of the law and the facts in the case. Affiant further states that he is advised from the records and files in the Department of Justice that Mr. Ira K. Wells, an Assistant Attorney General in the Department of Justice, prior to the middle of the year 1925, devoted a great amount of time also to an investigation of the facts of the case and had prepared briefs thereon, but as to the extent of his activities therein affiant is not able to further state.

The Government's bill in this cause sought a decree of this court adjudging the distribution of the said Jackson Barnett bonds to be unlawful, and to declare the possession thereof by the defendant Equitable Trust Company to be in trust for the use and benefit of Jackson Barnett, and under the control and supervision of the Secretary of the Interior as restricted property, and to decree an accounting thereof, and a return of all of same, together with all benefits therefrom accruing, into the hands of the Secretary of the Interior to be by him held under the law as restricted property for the use and benefit of the said Jackson Barnett, which was accordingly decreed by the court.

Affiant further states that while there was complete harmony of activity between the plaintiff and his solicitors and the Government and its solicitors in the preparation and conduct of the case, yet the Government carried on its prosecution of this case independently
of the plaintiff, on the theory that the acts of the Secretary in
307 releasing said funds and in permitting the distribution thereof did not operate to release the restrictions on said funds, and that the same should not be decreed to pass to the Oklahoma guardian or representative of the said Jackson Barnett, but that same should be returned to the Secretary of the Interior. Affiant states that for the greater part of three years the Department of Justice has been devoting, through one or the other of the representatives thereof, time in working on this cause.

CHARLES B. SELBY,
Special Assistant to the Attorney General of United States.

Subscribed and sworn to before me this 15th day of December, 1928.

[SEAL.] GRACE MURPHY,
Notary Public.

My commission expires Oct. 13th, 1929.

308 In United States District Court

[Title omitted.]

Affidavit of Thomas J. Crawford on application for allowances

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Thomas J. Crawford, being duly sworn, deposes and says:

I am an assistant United States attorney for the Southern District of New York and as such have been in charge of the above-entitled case from the time of the Government's participation therein to date. There have been also associated with me in the prosecution of this case Mr. Alvin Sylvester, and in a minor capacity Mr. Frank Chambers, both assistant United States attorneys for the Southern District of New York.

I have read the affidavits in support of the respective motions for allowances on account of counsel fees and expenses made in behalf of plaintiff's attorneys and through my association with the case am personally familiar with many of the items of service re-
309 ferred to in the affidavit of Carroll G. Walter. I believe the moving affidavits fully and fairly present the services rendered by the various attorneys in the successful conduct of this unusual and difficult litigation. Should the court overrule the contention made by the Government in its response to the petition filed herewith, that the property and money out of which the allowances must be paid are restricted against alienation, the department believes that the court, in determining the amount of the allowances, should be fully advised of the participation by the Government in the prosecution of the suit, and therefore submits the within affidavit and the affidavits of Charles B. Selby and Nat M. Lacy, which briefly outline the activities of the several Government attorneys attached to the Department of Justice in connection with the litigation.

While it is true, as stated in the affidavit of Rayburn L. Foster (pp. 9, 10) that in the earlier suit brought by Anna Laura Barnett, as prochein ami of Jackson Barnett, to ratify and enforce the provisions of the trust, the Government filed an answer for the defendants in that suit, to wit, Hubert Work, Secretary of the Interior, and Charles Burke, Commissioner of Indian Affairs, in which we prayed for the same relief demanded in the bill of complaint, to wit, the ratification of the deed of the gift, subsequently this answer was withdrawn and a motion to dismiss the bill substituted. This procedure was adopted after the Department had concluded to move to intervene in the above suit brought by Elmer S. Bailey, as prochein ami of Jackson Barnett, to set aside the gift and deed of trust as void.

310 Deponent submitted the motion to substitute a motion to dismiss and to withdraw the answer to Judge Winslow on the 5th day of January, 1926, motion being granted. Subsequently, and on February 22, 1926, pursuant to stipulation, an order was signed and filed dismissing the Anna Laura Barnett suit.

Meanwhile, on December 24, 1925, the United States Attorney's office served motion papers for leave to intervene and to file a petition of intervention in the above-entitled suit, said motion being returnable January 5, 1926, the proposed petition of intervention and papers in support of the motion for leave to file having been prepared by the Attorney General's office at Washington.

Deponent argued in support of the motion for leave to intervene on the return day of the motion before Judge Thacher. The motion was vigorously opposed by one of the defendants, the American Baptist Home Mission Society. After argument decision was reserved and deponent subsequently prepared and filed with the court a brief in support of the Government's motion for leave to intervene. As stated in his affidavit, Carroll G. Walter conferred with me in connection therewith, and suggested authorities supporting our application. The motion was granted by Judge Thacher in an opinion handed down January 21, 1926. On February 15, 1926, the defendant, American Baptist Home Mission Society, served its answer to the petition of intervention, and on March 10, 1926, the defendant Equitable Trust Co. of New York filed its answer thereto.

311 Thereafter, at the request of the Attorney General's office, I obtained the consent of the attorneys for the respective parties to the filing of an amended petition of intervention of the United States, which had been prepared by Mr. Charles B. Selby and George P. Barse, of the department. Subsequently testimony of witnesses in behalf of the plaintiff and of the United States was taken by depositions as set forth in the affidavits of Carroll G. Walter and Charles B. Selby.

On September 27, 1926, at the request of the Department, the deponent applied for and obtained a writ of habeas corpus ad testificandum, directed to the United States Marshal at Muskogee, Oklahoma, requiring the presence of Jackson Barnett before the Court on October 15, 1926, which date had been fixed as the trial date by Judge Thacher.

The trial not being reached on the date set, the return date of the writ was extended, upon deponent's request, from time to time, and deponent finally consented to the release of Jackson Barnett from the custody of the marshal upon receiving assurances of the defendant society's counsel in open court that they would produce Jackson Barnett upon the trial of the case.

Deponent also personally and actively participated in the taking of depositions in New York of four witnesses in behalf of the defendant society on October 28 and 29, 1926, said depositions being taken as matter of convenience to out-of-town witnesses of the defendant who were present waiting for the trial to be reached.

The case was finally reached for trial on the 16th day of No-
312 vember, 1926, and continued on the following days, to wit, 16th, 17th, 18th, 19th, 22nd, 23rd, and 24th. Deponent actively participated in the trial of the case in conjunction with his associates,

Alvin Sylvester, assistant U. S. attorney, and Charles B. Selby and Nat M. Lacy, special assistants to the attorney General. At the conclusion of the trial the court reserved decision, whereupon deponent, together with his associate, Mr. Sylvester, and Charles B. Selby, and other representatives of the Department of Justice, collaborated in the preparation and filing of the Government's brief. This brief numbered 199 pages. In connection with the preparation of the Government's brief your deponent's associate, Alvin Sylvester, spent considerable time, including extended conferences with the department's representatives at Washington, D. C.

Judge Knox handed down his opinion, declaring the deed of trust and gift to be invalid and decreeing that the defendants should account and pay over to the Secretary of the Interior the Liberty bonds and proceeds thereof, which was the subject of the gift. In this connection it should be observed that the court sustained the Government's contention in the only point of departure from plaintiff's position in this case, to wit, that the funds should be restored to the Interior Department and not, as prayed for by plaintiff, turned over to the Oklahoma guardian of Jackson Barnett.

Subsequent to the entry of the decree the defendant American Baptist Home Mission Society appealed therefrom to the Circuit Court of Appeals. Thereupon plaintiff, through its attorneys,
313 moved to dismiss the appeal for failure of the appellant American Baptist Home Mission Society to join as a party to the appeal the defendant Equitable Trust Company, trustee under the alleged gift and deed of trust. Your deponent filed a similar motion after collaboration with Mr. Patterson, of the firm of Patterson, Eagle, Grenough & Day, attorneys for the plaintiff. Deponent filed no brief in support of the motion to dismiss the appeal, inasmuch as in his judgment the matter was fully covered by the brief filed in behalf of the plaintiff. Thereafter the Government, through the Solicitor General William D. Mitchell, Assistant Attorney General B. M. Parmenter, and Special Assistant E. E. Danley, filed a brief in opposition to the petition for writ of certiorari filed in the Supreme Court by the American Baptist Home Mission Society to review the decree of the Circuit Court of Appeals dismissing the said appeal, deponent conferring with the attorneys for the plaintiff in regard thereto. The denial of the petition by the Supreme Court terminated the case except as to the application for allowances, the court having kept open the term to permit the filing thereof.

Deponent respectfully states that this affidavit and the affidavits of Mr. Selby and Mr. Lacy are submitted herewith solely for the information of the court and without prejudice to the position taken by the United States of America, intervenor, in its response simultaneously filed herewith that in view of the restriction against the alienation on the funds and property involved in this suit, the court is without jurisdiction to decree payment of any allowances out of said funds and property, as prayed for in the respective

314 petitions, and that such allowances can be made only by the Secretary of the Interior.

THOMAS J. CRAWFORD.

Sworn to before me this 17th day of December, 1928.

[SEAL.] RICHARD L. BALTIMORE,
Notary Public.

New York County No. 33.
New York Co. Register's No.
Commission expires March 30, 1929.

In United States District Court

Defendants' Exhibit 82

CONTRACT

KNOW ALL MEN BY THESE PRESENTS: THAT—

Whereas we, the undersigned, are of kin to and heirs apparent of Jackson Barnett, who is a full-blood Creek Indian, duly enrolled as such opposite roll No. 4524, and who is possessed of a very large estate, and for whom and whose estate Carl J. O'Hornett, of Henryetta, Oklahoma, has been duly appointed by the County Court of Okmulgee County, Oklahoma, as guardian on account of the incompetency of the said Jackson Barnett, and who has qualified and is now acting as such guarding; and

Whereas the said undersigned are informed that the said guardian has been unable to obtain the custody and control of the major
315 portion of the said estate of the said Jackson Barnett, but that without the consent and over the protest of said guardian said estate has been largely depleated and that gifts amounting to at least one million one hundred thousand ($1,100,000.00) follows, have been made therefrom; and

Whereas the said undersigned are informed and believe that such gifts were unlawfully and improperly made and amounted to unjustifiable and inexcusable abstractions from said estate and they are fearful that said estate is in danger of being further depleated, wasted, and lost, and the property and assets belonging thereto kept or taken away from the said Jackson Barnett and his said guardian and those entitled to the same, thereby unjustly and wrongfully depriving and keeping the said undersigned from acquiring and enjoying their proper and rightful inheritance in the event of the death of the said Jackson Barnett.

Now, therefore, we, the said undersigned, have engaged and employed, and do by these presents engage and employ, Cochran & Ellison, of Okmulgee, Oklahoma, as our attorneys to act for and represent us in all matters respecting our interests and rights, both present and future, in and to the said estate of the said Jackson Barnett, and to render all necessary legal services in connection therewith and for the purpose of preserving and conserving said estate, and we do furthermore authorize and empower them to

represent us in all suits and proceedings now pending or which may hereafter be instituted by the said guardian of the said Jackson Barnett or by any other person for him or on his behalf, with
316 the view of protecting and preserving his said estate or any part thereof, and said attorneys are furthermore empowered to continue to represent us in all matters respecting our interests and rights as heirs of the said Jackson Barnett after his death, including the rendering of all necessary or proper legal services in all probate matters, suits, and proceedings which may hereafter arise, affecting such estate as may be left by the said Jackson Barnett at the time of his death, and we furthermore authorize and empower said attorneys to perform any act or acts and to institute such legal proceedings as they may deem to be to the interest of the said undersigned or with the view of preserving the said estate of the said Jackson Barnett, provided the same be not inconsistent with his welfare while living; and in the event of his death said attorneys shall claim, recover, and protect such interest in said estate as the undersigned may respectively be lawfully entitled to receive as heirs.

And the said undersigned have agreed, and do hereby agree, to pay said attorneys for their services in the premises a reasonable fee, same to be not less than thirty per cent nor more than fifty per cent of the value of the property or of such sum or sums of money as they may recover or preserve as the result of their efforts and services; and in any event said attorneys shall be paid such compensation as shall be commensurate with the services performed by them under this contract, even though it might prove to be impossible to compute the same upon the basis above stipulated.

It is understood and agreed, moreover, that C. B. McCrory, the present attorney for the said guardian, is also retained as and for counsel to act and work with said attorneys, Cochran &
317 Ellison in all the matters contemplated and covered by this contract, excepting in such instances, if any may arise during said guardianship, in which the interest of the said undersigned and the interest of the said guardian may actually conflict; and the said McCrory shall receive as his compensation one-half of the fees above provided to be paid.

Witness the following signatures this the 19th day of June, 1923.

DAVID BARNETT.
CHARITY GRAYSON VON BUCHLEY.
JIMMY BARNETT.
NELLIE BARNETT, NOW FOSTER.
MARY BARNETT.
WILLIAM FISHER.
LITTLE (his thumb mark) FISH.
TINY FISH, wee BANNIA.
FRAZIER FISH.

Witness to signatures:
A. B. KEITH.

318 In United States District Court

[Title omitted.]

Replying affidavit of Carroll G. Walker on application for allowances

STATE OF NEW YORK,
County of New York, ss:

Carroll G. Walter, being duly sworn, deposes and says:

I have read the response of the United States to the application for an allowance to plaintiff's counsel herein and the affidavits of Nat M. Lacy, Charles B. Selby, and Thomas J. Crawford and the brief of the solicitors of Department of the Interior, submitted therewith, and make this affidavit in reply thereto.

As appears from the affidavit of Mr. Lacy, and as is more fully set forth in the original affidavits already submitted in support of this application, the intervention of the United States in this cause was brought about through the efforts of the plaintiff's counsel, particularly Mr. Cochran and Mr. Foster.

319 In so far as the intervention of the United States has been of benefit to Jackson Barnett, the services rendered in bringing about that intervention should be taken into consideration in determining the allowance.

At the time the Government decided to intervene there was pending before Judge Thacher a motion for an allowance for expense money, and under date of November 16, 1925, Mr. Lacy wrote my firm as follows:

PATTERSON, EAGLE, GREENOUGH & DAY, Esqs.,
120 Broadway, New York City, N. Y.

In re Barnett v. Equitable—E-31/91

GENTLEMEN: The Department of Justice of the United States has concluded to ask leave to intervene in this suit on behalf of the United States for the purpose of asking that the gift complained of in the bill be set aside to the end that the bonds be recovered for the benefit of Jackson Barnett. It does not, however, desire to make this request formally at this time. I would therefore appreciate it if you would ask the court to withhold decision for twenty days upon the plaintiff's motion for an allowance, which, I understand, is now pending before the court.

The Department of Justice does not wish to oppose the granting of the motion, but because of the relation of this case to other
320 matters it would prefer that no decision be announced in the interval above specified.

Respectfully,

NAT M. LACY,
Special Assistant to the Attorney General.

Subsequent thereto the United States presented its proposed petition of intervention, and in that petition it prayed as follows:

"1. That the defendants, the Equitable Trust Company and the American Baptist Home Mission Society, may be declared to have received and held the United States Liberty loan bonds heretofore described and amounting to the sum of $550,000 par value as the property of Jackson Barnett.

"2. That the defendants, Equitable Trust Company and the American Baptist Home Mission Society be declared to hold said bonds or the proceeds thereof, and all interest and profits received therefrom for the use and benefit of Jackson Barnett, and that said defendants be required to fully account for said bonds and the proceeds thereof, and all interest and profits therefrom, and that after deducting the reasonable expenses incident to this litigation said bonds or the proceeds thereof and the interest and profits thereon be delivered or paid over to the Secretary of the Interior of the United States; that
321 the defendants, Equitable Trust Company and the American Baptist Home Mission Society, be decreed to have no right, title, or interest in and to said bonds or the proceeds thereof, or the interest thereon, and that intervenor have such other and further relief as to the court may seem meet and proper."

The application of the United States for leave to intervene was opposed by the defendant mission society, and I personally prepared and submitted to Assistant United States Attorney Crawford, at his request, a memorandum in which I referred him to the four cases which Judge Thacher afterwards cited in his opinion as sustaining the right of the United States to intervene, and my inference from Mr. Crawford's request and attitude was that he had not previously been furnished with those authorities by the Department of Justice.

After the leave to intervene had been granted there was a further hearing before Judge Thacher upon the application for expense money. The United States did not oppose that application. The mission society, however, then argued that the allowance was then unnecessary because the United States had been permitted to intervene. Despite that argument, the motion was granted, as stated in the original affidavits.

It is therefore submitted that it is now the law of this case that the court has power to grant an allowance.

I do not know how much time and study were given to the prosecution of this case by the several attorneys representing the Government, but I do know that whatever study they bestowed, what-
322 ever information they obtained as a result of their examination of the law and the facts, the assistance which they gave me in the prosecution of the case was practically confined to (a) making available to me the files of the Interior Department with reference to the transaction, (b) aid in securing the presence of Barnett upon the trial, (c) securing the presence of Louis J. Somers,

who came from California and testified as to how Barnett's thumb mark had been obtained upon a will ratifying the gifts here attacked.

No briefs or memoranda upon the law, no names of available witnesses, no statements as to what facts any witnesses would testify to were furnished me by the Government, and no one representing the Government assisted in the preparation of any of the briefs which have been prepared and submitted on behalf of the plaintiff. On the contrary, my associates and myself are the ones who aided the Government by submitting briefs and authorities to its attorneys, and who located and interviewed and examined the several witnesses and prepared the briefs which have been submitted on behalf of the plaintiff.

I do not mean by this to say that there was not cooperation between the attorneys representing the Government and my associates and myself. The presence of the Government was valuable in that the appearance of the suit being one against the Government was thereby avoided, although the gift had been made by an officer of the Government. But the presence of the Government in the case did not in fact lighten our labors. On the contrary, the pres-
823 ence of the Government actually added to our labors and services because of the necessity we were under of consulting, advising, and cooperating with them.

In short, the Government left to my associates and myself the burden of prosecuting the suit, and my understanding of the situation throughout the entire prosecution of the case, derived from what the attorneys for the Government actually did and what they said to me, was that the Government deliberately and consciously intended that the burden should rest upon my associates and myself.

As to who actually conducted the examination of the witnesses I respectfully refer the court to the depositions themselves and to the minutes of the trial. As the court will see therefrom, Mr. Selby in most instances merely adopted on behalf of the Government the examination or cross-examination conducted either by Mr. Foster or myself, and in those few instances in which he did conduct an examination it was almost entirely merely an elaboration of what had been brought out either by Mr. Foster or myself.

In October, 1926, as the case was about to come on for trial, I received from the attorneys acting for the Government very definite intimations that the Secretary of the Interior and Commissioner Burke were pressing the Attorney General for an official opinion upon certain legal questions which were involved in this case and that there was great likelihood that the Attorney General would give to the Secretary of the Interior an official opinion which would be adverse to some of the propositions of law which my associates and myself were urging as of great importance in the determina-
824 tion of this case. The information which I received upon this point was so definite and disturbing that I requested the Attorney General to grant to Mr. Foster and myself an opportunity to

appear before him personally to discuss those questions of law. Mr. Foster and I then went from New York to Washington in company with Mr. Selby and made an argument before Attorney General Sargent and and Solicitor-General Mitchell on October 27, 1926, as stated in my original affidavit upon this application.

While, of course, I can not undertake to state the operations of the minds of the Attorney General and Solicitor General or of the other attorneys engaged in this case on behalf of the Government, I do state as my opinion and conviction, derived from all the facts and surrounding circumstances, that if the Government alone had been in charge of the prosecution of the case the case never would have been tried. Whether I be actually right or wrong in that opinion, the fact is, as above stated, that the presence of the Government in the case instead of lightening our labors actually added to them.

With reference to Mr. Selby's statement that in May, 1926, he caused notices to issue for the taking of depositions on behalf of the Government, I desire to state that the determination as to what witnesses should be examined and the schedule of dates for examination were worked out by Mr. Foster and myself and notices of taking depositions on behalf of the plaintiff were prepared and served by me; and it was after such notices had been given that the Gov-
325 ernment gave similar notices, which were practically copies of the notices I already had prepared and served.

With respect to the issuance of a writ of habeas corpus ad testificandum to secure the presence of Barnett upon the trial, the fact is that at the time it became necessary to obtain such writ Mr. Crawford was actually engaged in other matters connected with his offices which were so pressing that at his request I prepared for him the papers upon which the writ was obtained. Furthermore, to the best of my recollection it was I who suggested that the writ of habeas corpus ad testificandum was the proper process by which to secure the attendance of Barnett and found and submitted to Judge Thacher one or more authorities sustaining that position.

With reference to Mr. Selby's statements as to the dismissal of the appeal which was taken by the mission society, it was the plaintiff, not the Government, which first moved to dismiss the appeal upon the ground that it was invalid because the Equitable Trust Company had failed to join therein. The Government merely followed the plaintiff's motion. When the motion came on for hearing the Government had no brief ready in support of its motion, and the Circuit Court of Appeals required that the briefs be submitted on the day on which the motion was argued, and in consequence thereof the motion was considered and determined upon the plaintiff's brief alone without any brief from the Government. The oral argument in support of the motion was made by myself, the Government merely stating at the conclusion of my argument that it joined therein.

326 With reference to the mission society's petition for a writ of certiorari, I prepared a brief for the plaintiff in opposition thereto and furnished proof sheets thereof to the Government. Thereafter Mr. Crawford submitted to me a draft of brief for the Government, in opposition, which, he said, had been prepared by Mr. Danly, of the Department of Justice, and asked for my suggestions. I examined that draft brief, suggested the elimination of certain authorities which I thought inappropriate, prepared a fuller statement of the facts, and also drafted an additional point in opposition, and submitted all these to Mr. Crawford. The Government's brief as finally printed was in accord with all the suggestions which I made.

CARROLL G. WALTER.

Sworn to before me this 19th day of December, 1928.
[SEAL.] LILLIAN M. JACOB,
Notary Public, Kings County.

Kings Co. clerk's No. 81; reg.'s No. 196.
New York Co. clerk's No. 242; reg.'s No. 0-164.
Commission expires March 30, 1930.

327 In United States District Court

[Title omitted.]

Replying affidavit of Almond D. Cochran on application for allowances

STATE OF NEW YORK,
County of New York, ss:

Almond D. Cochran, being duly sworn, deposes and says: I have read the response of the United States to the application for an allowance to plaintiff's counsel herein, and the affidavits of Nat M. Lacy, Charles B. Selby, and Thomas J. Crawford and the brief of the solicitors of the Department of the Interior, submitted therewith, and make this affidavit in reply thereto.

In the prosecution of this case on behalf of the plaintiff it fell to my lot more particularly than to Mr. Foster and Mr. Walter to keep in touch with the attorneys in the Department of Justice who were working on this case on behalf of the Government.

328 I was with Mr. Selby and Mr. Lacy on many occasions and for long periods of time. Our relations were most friendly and it is with the greatest reluctance that I now make any statements which tend to minimize the value or effect of their services or which may be construed as an attempt to take credit for my associates and myself. In view, however, of the opposition which has been made I feel it is only right and just and in accordance with my duty that I explain, in more detail than has been done in the original affidavits, the nature of the cooperation between the Government and ourselves.

My first task was to induce the Government to come into the case on the side of the plaintiff. The efforts in that regard are set forth in full in the original affidavits.

Although Attorney General Stone reached the conclusion as early as February, 1925, that he thought the gifts entirely unauthorized and that it was the duty of the Government to use its best efforts to assist in recovering the same, the Government did not take any step to recover them and did not make any application to come into this case until November, 1925; and it made that application only after repeated insistence on my part.

After the Government was in the case, in my many conferences with the various attorneys in the Department of Justice it became apparent to me that the Department of Justice and its representatives were being subjected to great pressure from the Department of the Interior, which was seeking by various methods to have the Government either withdraw from the case or take an attitude upholding the gifts. From time to time the Government
329 attorneys raised with me various questions of law and suggested doubts in their minds which it became necessary for me to overcome by argument with them and the production of authorities. Sometimes questions of policy and expediency were raised which tended to delay and impede any action by the Government in behalf of the plaintiff. In brief, after the Government was in the case I performed a vast amount of services in attempting to keep it in the case on the side of the plaintiff.

Throughout the prosecution of the case I was repeatedly told by representatives of the Department of Justice that the burden of prosecuting the case was expected by them to be borne by my associates and myself. On some of these occasions I was reminded that my associates and myself were not hampered by certain limitations which, under the peculiar circumstances of the case, necessarily surrounded the efforts of the Department of Justice, and I was urged to exert the utmost efforts of which my associates and myself were capable. I was also assured that in event of success my associates and I would experience no difficulty in obtaining liberal compensation.

After the trial of the case I personally worked with Mr. Selby in the preparation of the Government's brief. At that time the brief for the plaintiff had been prepared in substantially final form and all material therein had been furnished to Mr. Selby.

The preparation of the Government's brief consumed a great deal of time, but the reason for that, as I know because of my personal participation therein, was that the attorneys engaged in pre-
330 paring it on behalf of the Government were hampered by the withdrawals which had been made upon the trial of certain of the allegations of their amended petition of intervention. Most of the time was devoted to efforts to phrase something which would enable the Government to stay in court at all without violating the

limitations which had been placed upon those engaged in the preparation of the brief.

ALMON D. COCHRAN.

Sworn to before me this 18th day of December, 1928.

LILLIAN M. JACOB,
Notary Public, Kings County.

Kings Co. clerk's No. 81; reg.'s No. 196.
New York Co. clerk's No. 242; Reg.'s No. 0-164.
Commission expires March 30, 1930.

331 In United States District Court

[Title omitted.]

Opinion of Knox, D. J., on application for allowances

Honorable Charles H. Tuttle, United States attorney (Thomas J. Crawford, Esq., of counsel), for Government.

Patterson, Eagle, Greenough & Day, Esqs. (Carroll G. Walter, of counsel); Hummer & Foster, Esqs. (Mr. Foster, of counsel); Cochran & Ellison, Esqs. (Mr. Cochran, of counsel); McCrory & Monk, Esqs. (Mr. McCrory, of counsel), for plaintiff.

Murray, Aldrich & Roberts, Esqs., attorneys for the Equitable Trust Company of New York (Harrison Tweed, of counsel).

Charles S. Fettretch, Esq., attorney for American Baptist Home Mission Society.

E. O. Patterson, Esq., Solicitor, Department of the Interior (O. H. Graves, assistant to Solicitor).

332 KNOX, *D. J.*:

The applications now before me for allowances for counsel fees, expenses, etc., out of the funds of Jackson Barnett which were the subject matter of the litigation in the above-entitled suit, suggest the thought that an Indian, like the wronged women of legend, always pays and pays and pays. And, in this case, precedent will again be followed, as the funds of an incompetent Indian are necessarily diminished through the payment of compensation to persons who put forth successful efforts in the maintenance of rights which should never have been invaded—particularly when they were under the protection of a department of the Government. In this connection, however, it is but fair to note that the sordidness of the story which narrates the facts of the studied attempt that was made to dissipate the wealth of Jackson Barnett is somewhat relieved by the attitude assumed by the Department of Justice when it became aware of what had taken place. When the department went to Barnett's relief it did so right valiantly, and is entitled to credit for what it helped accomplish. But although this be true, the fact is indisputable that the heat and burden of the conflicts which established Barnett's right to claim his own was chiefly borne by Mr. Walter of the

firm of Patterson, Eagle, Greenough & Day; by Mr. Foster, of the firm of Hummer & Foster; by Mr. Cochran, of the firm of Cochran & Ellison; and by Mr. McCrory, of the firm of McCrory and Monk.

Except for the diligence, skill, resourcefullness, and untiring energies of these men, supplemented by the Department of Justice,
333 property belonging to Barnett, and amounting to more than a half million dollars, would have been taken from his estate and devoted to purposes which, however worthy, he was unable to comprehend. But this is not all. Had it not been for what happened here, it might well have come to be an accepted fact that the supposed conservation of the property of Indian wards of the Government might, under certain circumstances, be little more than a mere device by which such property could be effectively and irretrievably dissipated at the behest of whomsoever could succeed in procuring an incompetent Indian to affix his thumb print to a deed of gift.

Even now the Department of the Interior, which is largely, if not wholly, responsible for the attempt that was made to dissipate the money of Barnett, insists that this court is without power to compensate the men who prevented that attempt from becoming an accomplished fact. The record of this case, as made in testimony and as contained in the affidavits filed in support of and in opposition to the pending motion, clearly indicates that the Department of the Interior opposed the effort to recover Barnett's money, and that it is not overly enthusiastic over the outcome of that effort. The court is told, to be sure, that the Government intervened in the suit instituted by Barnett's prochein ami and that it, the sovereign, should be credited with victory. That counsel, appearing on behalf of the United States, rendered worthwhile service is admitted; that they fought earnestly can not be denied; that they assisted in achieving
334 a result favorable to Barnett must be conceded, but any suggestion that the Government initiated the activities which have resulted in the righting of the wrong that was done Barnett, and is deserving of commendation for its alertness in doing so, is without foundation. The Government did not move to undo the acts of the Department of the Interior until after the present applicants had presented the details of the transaction before the Department of Justice, and enlisted its support. Even then, the attorneys for the prochein ami took a leading part in most of the matters that thereafter received attention. These considerations should receive some weight in giving thought to the arguments that are now advanced in opposition to the allowance of fees to the attorney for the prochein ami.

Reverting to the assertion that the court is without power to grant allowances, it is to be remarked that on a previous occasion in the pendency of the suit one of my colleagues authorized a disbursement from the Barnett funds in aid of the preparation for trial. That allowance was not opposed by the United States. So far as a principle of law is involved, the disbursements then authorized had a

basis no more stable than that upon which it is sought to support the present applications.

Furthermore, the order, entered upon my findings and conclusions on the merits of the case, clearly implied that fees and expenses in connection with the suit were expected by counsel, and would be allowed by the court. So far as can be remembered, no objection to such implication was expressed or taken. And certainly, the Government took no appeal from the order. It would appear, therefore, that the question as to the right of the court to make a reasonable allowance had come close to being decided, if it were not already determined.

335

Had the Secretary of the Interior never permitted the fund which forms the subject matter of this suit to get beyond his possession and control, I will agree that the court would be powerless to grant relief to any of the present petitions. The then Secretary, however, saw fit to release the supervision over the disposition of the fund which had been committed to him by Congress. He was not incompetent, as was the case with respect to Barnett, and until the fund is restored to the possession of the Department of the Interior, that department is without license to complain that the reasonable costs and expenses incident to the restoration of the fund to its control are deducted therefrom. The fund is now a res within the control of this court, and justice requires that such res should bear the fees and expenses of its preservation. (Kendall *v.* Ewert, 259 U. S. 139, 149.)

This litigation has extended over a period of four years and, with its ramifications in other courts, has few, if any, parallels in my experience. The tale of the entire episode, as it was unfolded in court, is a matter of record in the books, and he who wishes may read it there. The court is presently concerned with the price of the story. Unfortunately for the integrity of Barnett's fund—and deplorable as this is—but in fairness to the champions of his rights, the price must be high. But not so high as that which is asked. While I appreciate the character of the services rendered in behalf of Barnett, the contingent fee agreement of December 11, 1924, which called for a payment to the attorneys of forty per cent of the amount of the recovery, will not be recognized as binding upon this court. Counsel fees will be fixed in an amount which, in my judgment, seems fair and reasonable. In an endeavor to arrive at that amount I must bear in mind the nature of the fund out of which the fees must come, and the manner by which it came into existence, as well as the danger to which it was subjected. In justice to Barnett, and out of the respect in which the court holds itself, I shall seek to avoid any imputation from a responsible source that Barnett's money was saved from others in order that the judiciary might order its distribution among members of the bar. After full consideration I have decided to allow as fees to the four firms of attorneys heretofore named twenty-five percentum of the value

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of the fund in the hands of the Equitable Trust Company of New York, as of the date of the decree herein, plus $10,000. Such allowance, when received by said attorneys, is to be in full payment of all services rendered herein, and is to be divided among them as they may agree. If they are unable to agree upon such division, the court will apportion the allowance between them. There shall also be paid to said firms in reimbursement of their out of pocket expenses the sum of $4,282.93.

The prochein ami for Barnett may have for his services the sum of seventy-five hundred dollars, with his expenses, not to exceed five hundred dollars, when proof of such disbursements is submitted to the court.

337 The application for an allowance to the attorneys for the defendant trustee is denied. The part played by these attorneys in the drama—and this case is nothing less—was altogether creditable, and was of assistance to the court. Nevertheless, I have, in my opinion, no right to make the allowance they ask.

Last, but by no means least, the services of United States Attorney Crawford should be acknowledged as being of high intelligence, of great help in the solution of the questions involved, and as evidencing the worthy effort of a capable, high-minded, and conscientious public servant. From a material standpoint his recompense will be the paltry sum which the Government pays him in the way of salary, and for which it is too often able to secure services of unusual merit.

December 27, 1928.

JNO. C. KNOX, *U. S. D. J.*

338 In United States District Court

[Title omitted.]

Stipulation as to apportionment of fees

It is hereby stipulated and agreed by and between the undersigned counsel for the plaintiff herein as follows:

1. The allowance made in the opinion of Judge Knox, dated December 27, 1928, for services of the undersigned firms in this case shall be divided into two (2) parts, and the decree to be entered upon said opinion shall provide that one-third of such allowance shall be paid to Patterson, Eagle Greenough & Day, and that two-thirds thereof shall be paid to Hummer & Foster.

2. The compensation of Cochran & Ellison and McCrory & Monk is to be paid by Hummer & Foster out of the shares allowed to them and the decree need not specifically direct any payment to Cochran & Ellison and/or McCrory and Monk.

339 3. The sum of $4,282.93 allowed in said opinion of Judge Knox in reimbursement of out-of-pocket expenses shall be paid

to the firms of Patterson, Eagle, Greenough & Day, Hummer & Foster, and Cochran & Ellison in accordance with the items of expense set forth in the affidavits of Carroll G. Walter, Rayburn L. Foster, and Almond D. Cochran, submitted upon said application.

Dated December 31, 1928.

PATTERSON, EAGLE, GREENOUGH & DAY,
By CARROLL G. WALTER,
A Member of said Firm.

HUMMER & FOSTER,
By RAYBURN L. FOSTER,
A Member of said Firm.

COCHRAN & ELLISON,
By A. D. COCHRAN,
Surviving Partner of said Firm.

McCROBY & MONK,
By DUDLEY C. MONK,
A Member of said Firm.

340 In United States District Court

[Title omitted.]

Affidavit of Alfred Snyder as to value of fund, January 3, 1929

STATE OF NEW YORK, *County of New York, ss:*

Alfred D. Snyder, being duly sworn, deposes and says:

I am an assistant secretary of the Equitable Trust Company of New York and am familiar with the proceedings of said trust company as the trustee named in an agreement dated February 1, 1923, made by the American Baptist Home Mission Society and approved by the Secretary of the Interior of the United States.

The fund in the hands of said trust company, as the trustee named in said agreement, as it existed at the time of the entry of the decree of November 21, 1927, herein, is as set forth in said decree, to which reference is hereby made.

341 Since the entry of said decree the $30,000 par value of United States of America second Liberty loan bonds and the $108,000 par value United States of America Treasury notes, mentioned in said decree, have been paid in full at par and said trust company now holds in lieu thereof the sum of $188,000 in cash.

Since the entry of said decree said fund has earned income amounting to $33,964.91, as is set forth in detail in Schedule A, hereto annexed and hereby made a part of this affidavit.

The total fund now held by said trust company thus now consists of the following, the market values of the bonds having been taken by me from the published quotations appearing in the New York Times of this date:

At the mean of that date—	Market value
$155,000 par value United States of America fourth Liberty loan 4¼'s, due October 15, 1938	$155,532.82
$100,000 par value United States of America first Liberty loan 3½'s, due June 15, 1947	99,875.00
$216,000 par value United States Government 4's, due December 15, 1954	230,310.00
Cash	222,742.18
Total	708,460.00

ALFRED D. SNYDER.

342 Sworn to before me this 3rd day of January, 1929.

MORTIMORE F. HILL,
Notary Public, Westchester County.

Certificate filed, New York County.
Clerk's No. 312, register's No. 0-255.
Commission expires March 30, 1930.

Schedule A to affidavit of A. D. Snyder

Coupons of $155,000 U. S. A. 4th Liberty 4¼'s:		
1928		
April 15	$3,293.75	
Oct. 15	3,293.75	
		$6,587.50
Coupons on $100,000 U. S. A. 1st Liberty 3½'s:		
1927		
Dec. 15	$1,750.00	
1928		
June 15	1,750.00	
Dec. 15	1,750.00	
		5,250.00
Coupons on $80,000 U. S. A. 2nd Liberty 4¼'s:		
1927		
Nov. 15		1,700.00
(These bonds were called at par on that date.)		
343 Coupons on $216,000 U. S. Government 4's:		
1927		
Dec. 15	$4,320.00	
1928		
June 15	4,320.00	
Dec. 15	4,320.00	
		12,960.00
Coupons on $108,000 Treasury notes 4¼'s:		
1927		
Dec. 15		2,430.00
(These notes fell due and were paid on that date.)		
Interest on cash balances:		
To January 1, 1928	$455.09	
To April 1, 1928	991.39	
To July 1, 1928	1,014.63	
To October 1, 1928	1,220.64	
To January 1, 1929	1,355.66	
		5,037.41
		33,964.91

344 In United States District Court

[Title omitted.]

Affidavit of A. F. Schaeffner as to value of fund on November 21, 1927

STATE OF NEW YORK,
County of New York, ss:

Aloysius F. Schaeffner, being duly sworn, deposes and says:

I am an attorney and counsellor at law associated with the firm of Patterson, Eagle, Greenough & Day.

I have ascertained the value of the securities set forth in the decree of November 21, 1927, by examining the published quotations thereof appearing in the Commercial and Financial Chronicle and find that the values thereof on November 21, 1927, were as follows:

345

Security	Value
$155,000 par value United States of America 4th Liberty Loan 4¼'s, due October 15, 1938	$161,200.00
$103,000 par value United States 1st Liberty Loan 3½'s, due June 15, 1947	101,625.00
$80,000 par value United States 2d Liberty loan converted 4¼'s	80,000.00
$216,000 par value United States Government 4's, due December 15, 1954	238,140.00
$108,000 par value United States Treasury notes 4½'s, due December 15, 1927	108,000.00
	688,965.00

$80,000 United States 2d Liberty loan converted 4¼'s were actually redeemed at par on November 15, 1927.

There were no quotations for the $108,000 United States Treasury notes and the same have been listed at par because they were actually paid at par on December 15, 1927.

I have also computed the accrued interest upon the above mentioned securities to November 21, 1927, and find that the amount of such accrued interest on that date was $9,782.07, including $1,700, the amount of the November 15, 1927, coupons upon the $80,000 United States 2d Liberty loan 4¼'s which the account of the Equitable Trust Company herein shows are not include in the decree.

346 The value of the fund mentioned in said decree as of the date of said decree is thus the total of $688,965.00 plus said accrued interest of $9,782.07 and plus the $777.27 in cash mentioned in said decree, making a total of $699,524.34.

Twenty-five per cent (25%) of said total value plus $10,000 is thus $184,881.08.

ALOYSIUS F. SCHAEFFNER.

Sworn to before me this 8th day of January, 1929.

[SEAL.] LILLIAN M. JACOBS,
Notary Public, Kings County.

Kings Co. clerk's No. 81, register's No. 196.
New York Co. clerk's No. 242, register's No. 0–164.

Commission expires March 30, 1930.

347 In United States District Court

[Title omitted.]

Decree on application for allowances

January 8, 1929

Applications for allowances herein having been duly presented to the court, and the court having delivered its opinion thereon dated December 27, 1928, and there having been filed an affidavit by Alfred D. Snyder, assistant secretary of the defendant trust company, verified January 3, 1929, from which it appears that the fund in the hands of said trust company is as follows:

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Security	Market Value.
$155,000 par value United States of America fourth Liberty loan 4¼'s, due October 15, 1938	$155,632.82
$100,000 par value United States of America first Liberty loan 3½'s, due June 15, 1947	99,875.00
$216,000 par value United States Government 4's, due December 15, 1954	230,310.00
Cash	222,742.18
Total	708,460.00

and there having been filed an affidavit by Aloysius F. Schaeffner, verified January 8, 1928, from which it appears that the value of said fund at the date of the decree of November 21, 1927, herein was $699,524.34 and that 25% of such value plus $10,000 is $184,881.08, and there having been filed a stipulation dated December 31, 1928, duly signed by the firms of Patterson, Eagle, Greenough & Day, Hummer & Foster, Cochran & Ellison, and McCrory & Monk, stipulating for an apportionment of their fees between themselves as hereinafter provided;

Now, upon consideration thereof, it is

Ordered, adjudged, and decreed as follows:

1. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed to pay, out of
349 the fund hereinabove mentioned, to Hummer & Foster the sum of $123,254.05 in full payment of all services rendered by the firms of Hummer & Foster, Cochran & Ellison, and McCrory & Monk in this cause, and the further sum of $1,168.53 in reimbursement of the out-of-pocket expenses of said firm of Hummer & Foster herein.

2. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed to pay, out of the fund hereinabove mentioned, to Patterson, Eagle, Greenough & Day the sum of $61,627.03 in full payment of all services rendered by said firm of Patterson, Eagle, Greenough & Day herein, and the further sum of $1,849.40 in reimbursement of the out-of-pocket expenses of said firm of Patterson, Eagle, Greenough & Day herein.

3. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed to pay, out of the fund hereinabove mentioned, to Cochran & Ellison the sum of $1,265 in reimbursement of the out-of-pocket expenses of said firm of Cochran & Ellison herein.

4. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed to pay, out of the fund hereinabove mentioned, to Elmer S. Bailey the sum of $7,500 in full payment of his services as prochein ami herein.

5. That the defendant The Equitable Trust Company of New York be and it is hereby ordered and directed, after making
350 the payments hereinabove specified, to pay, transfer, and deliver to the Secretary of the Interior of the United States, to be held by him as property of Jackson Barnett under and pursuant to the acts of Congress relating thereto, the entire remaining balance of the fund hereinbefore mentioned, to wit.

Security	Value
$155,000 par value United States of America fourth Liberty loan 4¼'s, due October 15, 1938	$155,532.82
$100,000 par value United States of America first Liberty loan 3½s, due June 15, 1947	96,875.00
$216,000 par value United States Government 4's, due December 15, 1954	230,310.00
Cash	26,078.01
Total	511,795.83

6. That the application of Murray, Aldrich & Roberts for an allowance out of the fund hereinabove mentioned for their services and disbursements as solicitors for the defendant trust company herein be and the same is hereby denied.

7. That upon making the payments, transfers, and deliveries hereinabove directed the defendant The Equitable Trust Company of New York shall be discharged from all duty, responsibility, accountability, and liability under the agreement executed by the American
Baptist Home Mission Society to the Equitable Trust Com-
351 pany of New York, dated February 1, 1923, and with respect to the property received by it thereunder and the income and proceeds thereof.

JNO. C. KNOX, *U. S. D. J.*

Notice of settlement waived.

MURRAY, ALDRICH & ROBERTS,
Solicitors for the Equitable Trust Company of New York.
CHARLES H. TUTTLE,
United States Attorney,
Solicitor for United States of America.

352 In United States District Court

[Title omitted.]

Petition and allowance of appeal

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Now comes the United States of America, intervenor herein, by its attorney, Charles H. Tuttle, United States attorney for the Southern District of New York, and feeling itself aggrieved by the decree entered herein on the 8th day of January, 1929, by which it was adjudged that the defendant The Equitable Trust Company of New York pay out of the funds of Jackson Barnett, a mental incompetent and full-blood restricted Indian of the Five Civilized Tribes, certain allowances aggregating $184,881.08 by way of counsel fees and disbursements in the sum of $3,017.93 to attorneys and
353 counsel employed by Elmer S. Bailey, as prochein ami, and an allowance of $7,500.00 to the prochein ami for his services, all with respect to the prosecution of the above-entitled suit, states that in the said decree and the proceedings had in connection with the entry thereof certain errors were committed to the prejudice of the intervenor, the United States of America, all of which more fully appears in the assignment of errors filed herewith.

Wherefore the United States of America, the intervenor herein, prays that an appeal may be allowed to it from the United States Circuit Court of Appeals for the correction of the errors so complained of and that the transcript of record, proceedings, and papers involved in this appeal, duly authenticated, may be sent to the said Circuit Court of Appeals.

Dated, New York, January 22, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York, Attorney for United States of America, Intervenor.

Appeal as prayed for is hereby allowed.

Dated, New York, January 22, 1929.

JNO. C. KNOX, *U. S. D. J.*

354 In United States District Court

[Title omitted.]

Assignment of errors

Now comes the United States of America, intervenor, by its attorney, Charles H. Tuttle, United States attorney for the Southern District of New York, and files the following assignment of errors upon which it will rely in the prosecution of its appeal from the decree of this court entered herein on the 8th day of January, 1929,

First. The court erred in holding and deciding that it had such jurisdiction over the funds and property in the possession of the defendant The Equitable Trust Company of New York belonging to Jackson Barnett, a full-blood Creek Indian and member of the Five Civilized Tribes of Oklahoma and ward of the United States of America, intervenor herein, as to authorize the court to make the allowances which by its said order of January 8, 1929, it
355 directed the defendant The Equitable Trust Company of New York to pay out of the funds and property in its possession, as aforesaid, to wit, to Messrs. Patterson, Eagle, Greenough & Day, to Messrs. Hummer & Foster, to Messrs. Cochran & Ellison, and to Messrs. McCrory & Monk, allowances for counsel fee for services rendered herein the sums aggregating $184,881.08, and the sum of $3,017.93 on account of disbursements, and to Elmer S. Bailey on account of his services as prochein ami herein the sum of $7,500.00.

Second. The court erred in directing the payment by the defendant The Equitable Trust Company of New York, out of the funds and property in its possession belonging to the said Jackson Barnett, of the allowances hereinabove mentioned for services rendered and disbursements incurred without the approval of the Secretary of the Interior of the United States of America.

Third. The court erred in refusing to hold that the funds and property in the possession of the said defendant The Equitable Trust Comapny of New York constituted restricted funds of Jackson Barnett, a full-blood Creek Indian of the Five Civilized Tribes and ward of the United States of America, intervenor herein, and in refusing to hold that the court was without jurisdiction, therefore, under the law, to direct the payment of any allowances on account of counsel fees and expenses incurred in connection with the prosecution of the suit herein without the consent and approval of the Secretary of the Interior of the United States of America.

Fourth. The court erred in refusing to hold that the United
356 States of America, intervenor herein, through its Secretary of the Interior, is entitled to the return and to the custody of the said property and funds of the said Jackson Barnett, undiminished by the payment of any allowances by way of counsel fees and/or disbursements.

Fifth. In any event, allowances fixed by the court and directed by the aforesaid decree to be paid to Messrs. Patterson, Eagle, Greenough & Day, to Messrs. Hummer & Foster, to Messrs. Cochran & Ellison, and to Messrs. McCrory & Monk, aggregating the sum of $184,881.08, and the allowance of $7,500.00 to the prochein ami were excessive in amount and beyond fair and reasonable compensation for the services rendered herein.

Wherefore the United States of America, intervenor herein, prays that the said decree of the District Court of the United States for the Southern District of New York in so far as it directs the payment of the aforesaid allowances and disbursements may be reversed and, in order that the foregoing assignment of errors may

be a part of the record, the United States of America, intervenor herein, presents the same to the court and prays that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such matter made and provided. All of which is respectfully submitted.

Dated, New York, January 22, 1929.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York, Attorney for the United States of America, Intervenor.

357–358 [Citation in usual form omitted in printing.]

359 In United States District Court

[Title omitted.]

Stipulation as to record on appeal

It is hereby stipulated and agreed that the record on appeal herein shall consist of the following, to wit:

360 1. Statement under rule 13, subdivision 4.
2. Amended bill of complaint.
3. Answer of Equitable Trust Company.
4. Answer of American Baptist Home Mission Society.
5. Motion of United States for leave to intervene.
6. Petition of intervention of United States.
7. Opinion of Thacher, D. J., on motion of United States for leave to intervene.
8. Answer of Equitable Trust Company to petition of intervention.
9. Answer of American Baptist Home Mission Society to petition of intervention.
10. Order granting application for expense money.
11. Order permitting amended petition of intervention by United States.
12. Amended petition of intervention of United States.
12a. Statement at trial withdrawing certain allegations.
13. Opinion of Knox, D. J., on final hearing.
14. Final decree of November 21, 1927.
15. Order of March 7, 1928, as to applications for allowances.
16. Order of March 28, 1928, as to applications for allowances.

361 17. Order of May 25, 1928, as to applications for allowances.
18. Notice of motion for allowance to prochein ami.
19. Notice of motion for allowance to plaintiff's counsel.
20. Affidavit of Carroll G. Walter in support of application for allowances.
21. Affidavit of Rayburn L. Foster in support of application for allowances.

22. Affidavit of Almond D. Cochran in support of application for allowances.
23. Response of United States to application for allowances.
24. Affidavit of Nat M. Lacey on application for allowances.
25. Affidavit of Charles B. Selby on application for allowances.
26. Affidavit of Thomas J. Crawford on application for allowances.
26a. Defendants' Exhibit 82.
27. Replying affidavit of Carroll G. Walter on application for allowances.
28. Replying affidavit of Almond D. Cochran on application for allowances.
29. Opinion of Knox, D. J., on application for allowances.
30. Stipulation as to apportionment of fees.
362 31. Affidavit of Alfred D. Snyder as to value of fund on hand January 3, 1929.
32. Affidavit of Aloysius F. Schaeffner as to value of fund on November 21, 1927.
33. Decree of January 8, 1929, on application for allowances.
34. Petition for and allowance of appeal of United States.
35. Assignment of errors.
36. Citation.

And in addition to the foregoing all depositions, testimony, exhibits, briefs, and other papers submitted to and filed in the District Court in the above-entitled matter not included in the matters hereinbefore specifically enumerated.

Dated, New York, February 19, 1929.

CHARLES H. TUTTLE,
United States Attorney, Solicitor for Appellant.
MURRAY, ALDRICH & ROBERTS,
Solicitors for the Equitable Trust Company of New York and Murray, Aldrich & Roberts.
PATTERSON, EAGLE, GREENOUGH & DAY,
Solicitors for All Other Appellees.

363 In the United States Circuit Court of Appeals

[Title omitted.]

Order as to printing

Upon the annexed consents and upon motion of Charles H.
364 Tuttle, United States attorney for the Southern District of New York, attorney for the United Sattes of America, intervenor-appellant, it is

Ordered that the following papers only of the record on appeal herein shall be printed and included in the transcript of record on appeal, to wit:

1. Statement under rule 13, subdivision 4.

2. Amended bill of complaint.
3. Answer of Equitable Trust Company.
4. Answer of American Baptist Home Mission Society.
5. Motion of United States for leave to intervene.
6. Petition for intervention of United States.
7. Opinion of Thacher, D. J., on motion of United States for leave to intervene.
8. Answer of Equitable Trust Company to petition of intervention.
9. Answer of American Baptist Home Mission Society to petition of intervention.
10. Order granting application for expense money.
11. Order permitting amended petition of intervention by United States.
12. Amended petition of intervention of United States.
12a. Statement at trial withdrawing certain allegations.
365 13. Opinion of Knox, D. J., on final hearing.
14. Final decree of November 21, 1927.
15. Order of March 7, 1928, as to applications for allowances.
16. Order of March 28, 1928, as to applications for allowances.
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20. Affidavit of Carroll G. Walter in support of application for allowances.
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22. Affidavit of Almond D. Cochran in support of application for allowances.
23. Response of United States to application for allowances.
24. Affidavit of Nat. M. Lacey on application for allowances.
25. Affidavit of Charles B. Selby on application for allowances.
26. Affidavit of Thomas J. Crawford on application for allowances.
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366 27. Replying affidavit of Carroll G. Walter on application for allowances.
28. Replying affidavit of Almond D. Cochran on application for allowances.
29. Opinion of Knox, D. J., on application for allowances.
30. Stipulation as to apportionment of fees.
31. Affidavit of Alfred D. Snyder as to value of fund on hand January 3, 1929.
32. Affidavit of Aloysius F. Schaeffner as to value of fund on November 21, 1927.
33. Decree of January 8, 1929, on application for allowances.
34. Petition for and allowance of appeal of United States.
35. Assignment of errors.
36. Citation.

37. Stipulation as to contents of record on appeal dated February 20, 1929.

And it is further ordered that all depositions, testimony, exhibits, briefs, and all other papers included by the stipulation of the parties to this appeal filed in the United States District Court on the 20th day of February, 1929, as constituting the record of appeal, may be omitted from and not printed in the transcript of record on appeal but may be referred to and submitted to the court upon the argument
of the appeal by any of the parties to the appeal with the same
367 force and effect as though the same were printed and included in the transcript of record herein.

Dated, New York, February 20th, 1929.

MANTON,
United States Circuit Judge.

The entry of the foregoing order is hereby consented to.
Dated, New York, February 19, 1929.

CHARLES H. TUTTLE,
United States Attorney, Solicitor for Appellant.
MURRAY, ALDRICH & ROBERTS,
Solicitors for the Equitable Trust Company of New York and Murray, Aldrich & Roberts.
PATTERSON, EAGLE, GREENOUGH & DAY,
Solicitors for All Other Appellees.

368 In United States District Court

[Title omitted.]

Stipulation on appeal record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

369 Dated March 8th, 1929.

CHARLES H. TUTTLE,
United States Attorney,
Attorney for United States, Appellant.
MURRAY, ALDRICH & ROBERTS,
Attorneys for the Equitable Trust Co. of New York and Murray, Aldridge & Roberts, Appellees.
PATTERSON, EAGLE, GREENOUGH & DAY,
Attorneys for All Other Appellees.

370–371 [Clerk's certificate to foregoing transcript omitted in printing.]

372 In United States Circuit Court of Appeals for the Second Circuit

No. 381—October term, 1928

Argued May 17, 1929. Decided July 15, 1929

JACKSON BARNETT, A MENTAL INCOMPETENT, BY Elmer S. Bailey, His Procheim Ami, plaintiff

v.

EQUITABLE TRUST COMPANY OF NEW YORK AND the American Baptist Home Mission Society, defendants

UNITED STATES OF AMERICA, INTERVENER

EQUITABLE TRUST COMPANY OF NEW YORK; Murray; Aldrich & Roberts; Edward J. Patterson, J. Frederick Eagle, Wm. Greenough, Sherman Day, Carroll G. Walter, and Dodge L. Marks, Composing the Firm of Patterson, Eagle, Greenough & Day; Rayburn L. Foster and R. B. F. Hummer, Composing the Firm of Hummer & Foster; Almond D. Cochran, Surviving Partner of the Firm of Cochran & Ellison; C. B. McCrory and Dudley C. Monk, Copartners Composing the Firm of McCrory & Monk; and Elmer S. Bailey, Individually and as Procheim Ami of Jackson Barnett, appellees

v.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Opinion

Appeal by the United States from a decree of the District Court for the Southern District of New York making allowances to the attorneys for, and prochein ami of, the plaintiff in a suit in equity.

On January 22, 1925, one Jackson Barnett, a full-blooded Creek Indian, filed his bill in the District Court for the Southern District of New York against the Equitable Trust Company of New York and the American Baptist Home Mission Society, in which he alleged in substance: That he was an incompetent person, 75 years of
373 age, and the owner of a quarter section of land in Oklahoma on which oil had been found. This land he had leased in due form of law, and had received very large royalties from it, which had accumulated in the hands of the Secretary of the Interior. That the mission society, in conjunction with others, had practiced upon

his incompetence and secured the consent of the Secretary of the Interior to his gift to it of $550,000, out of which he was to have while he lived a yearly income of $20,000, the remainder going with the principal. These funds the mission had deposited with the defendant trust company, and the suit was to compel it to turn them back to Barnett.

Being an incompetent and so alleging, Barnett sued by one Bailey as his prochein ami, who was at that time acting as the guardian of his property under appointment of the Oklahoma County Court. The Secretary of the Interior declined to join in pressing the suit, but eventually, after much effort by Barnett's attorneys and in the face of opposition from the Secretary, the Attorney General was persuaded to apply for intervention on behalf of the United States, and this was eventually allowed, over the objection of the defendants, on January 29, 1926.

Meanwhile the defendants' attorneys, who were also attorneys for Barnett's wife, to whom he had made an equal gift which he was trying to set aside in a separate suit, began three proceedings in his name against Bailey in Oklahoma. One of these was a suit in equity in the United States District Court for the Eastern District of Oklahoma to enjoin him from asserting any control over Barnett's estate. The second was in the County Court of Oklahoma to revoke his letters of guardianship, Bailey having theretofore made a contingent agreement with Barnett's attorneys that they should prosecute the litigation for 40 per cent of the recovery. The third was for a writ of prohibition out of the Supreme Court of Oklahoma, to prevent the county judge and Bailey from interfering with any funds in Barnett's hands or those here in suit. Barnett was represented in these proceedings by another prochein ami, and they were very extensively litigated. The net result of all was that Bailey's letters were vacated upon a technical ground, the writ was refused, and the suit in equity was dismissed. The services in these proceedings were included among those for which allowance was asked.

In the preparation for trial of this suit it was necessary to take the depositions of many witnesses in Oklahoma, and it was thought desirable to have Barnett present in the custody of a marshal. All this entailed much traveling and time, as did the preparation of the cause upon the law. The attorneys likewise unsuccessfully beset the Secretary of the Interior with applications for an allowance out of Barnett's funds for the prosecution, and spent much energy in securing the intervention of the United States. This, too, involved much traveling and time. The cause came on for trial in November, 1926, and consumed seven days; it was decided in favor of Barnett a year later, the decree directing the defendant trust company to restore the funds—which then amounted to nearly $700,000—to the Secretary of the Interior, subject to such allowances as the court might make. The mission society appealed to this court, but the appeal was dismissed, and a petition for certiorari was denied.

Thereafter the court, upon petition for allowance, awarded the attorneys for Barnett 25 per cent of the amount of the fund, together with $10,000, about $184,000 in all, and their expenses, and to Bailey, as prochein ami, $7,500. The United States as intervener opposed these allowances; it alleged that the funds remained restricted property, though in the hands of the defendant trust company, and that only the Secretary had power to make any allowance whatever. If not, it maintained that in any event the allowances were too large, since the proceedings in Oklahoma did not concern the suit at bar, and that after the intervention of the United States in November, 1925, it, not Bailey, was the representative of Barnett, and that the appellees had no claim for anything done thereafter.

Nat M. Lacy, of Washington, D. C. (O. H. Graves, of Washington, D. C., on the brief), for appellant.

Carroll G. Walter, of New York City, for appellees.

L. HAND, Circuit Judge (after stating the facts as above): We hold that the District Court had power to make an allowance out of the fund. Whatever the status before May 27, 1908, of the lands of allottees of the Five Civilized Tribes, of whom the Creeks are one, the act of that day (35 Stat. 312), established their position from
374 that time on. They were not to be conveyed before April 26, 1931, "except that the Secretary of the Interior may remove restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." The property remained the Indian's, but he was restrained in its alienation, except as the Secretary might allow; when the Secretary concurred, he was free, like another owner, to transfer his rights. This applied as well to the proceeds of his land, in this instance to the royalties arising from a lawful lease, as to the realty itself. When, therefore, Barnett, with the Secretary's consent, gave the securities to the mission the funds passed to its hands unrestricted and as free funds.

Only a court could undo the transaction so taking place. This is plain, if Barnett knew enough of what he was about to intend the transfer. In that case title passed, and a court of equity must declare it void. If, as the twentieth article of the bill seems to allege, he did not so intend, at least possession passed, and the Secretary could not recall it by virtue of his office; either Barnett or the United States must sue to get it. What either got might have to come back to the Secretary's custody, but his powers would revive only then, and to only so much as in fact did. We can, therefore, see no reason to say that the court's wings were clipped by restrictions which the Secretary had lawfully, if improvidently, removed, or that it need, or indeed should, have shared its jurisdiction with him. It could, for instance, scarcely be argued that, had the res been meanwhile cared for by a third person, he could not intervene in the suit in his own behalf and secure a determination of his claim, or that he must present it to the Secretary and abide his decision. Congress might

perhaps have vested him with such power, but it did not. The res was at large; courts alone could direct its distribution. The situation, therefore, is no different from that often before a court, in which it is necessary to sacrifice part of a property to preserve or regain the rest. The District Court, not being able to decide without evidence and assistance as to the law, properly restored only so much as remained after those services were paid which had enabled it to act. (Kendall v. Ewert, 259 U. S. 139, 149, 42 S. Ct. 444, 66 L. Ed. 862.) The stake was the remainder, to which alone the restrictions of the statute can apply. The only question is of the proper amount.

Barnett might have sued alone, as he did (Tiger v. Western Investment Co., 221 U. S. 286, 31 S. Ct. 578, 55 L. Ed. 738), or the United States might have sued for him (Heckman v. U. S., 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820). The choice lay with the Attorney General. He did sue alone, and certainly until he procured the intervention of the United States his attorneys might claim for their services as in any other case. In January, 1926, this changed, for the United States then intervened as a party plaintiff, unlike Bailey, who was not a party at all. The Attorney General might, indeed, have imposed it as a condition that Barnett should retire, which would have left the United States in complete charge. He did not, probably for the reason that Barnett's attorneys had already gone so far; but we see no reason why there should not have been two plaintiffs, and why each should not be represented. But, if so, the appellees should not be deprived of fees which they earned under their separate retainer. They had received no intimation that their services were for the United States, which had it been made, would certainly have provoked a definite understanding. Each plaintiff proceeded in its own behalf, and, while the appellees must in theory abate their claim for any services in fact made unnecessary by their intervention, there need be no such deduction, for they did substantially all that was done. It is too late now, after the heat of the day, to suggest that their client had been changed sub silentio.

However, we can not agree that the Oklahoma litigation was part of this suit or that those services should be paid for here. True, Barnett was an incompetent person, and as such the court would not leave him to his own devices, which were so meager. Bailey appeared as his prochein ami, and the court was satisfied to let him continue. It need not have done so; at any time it might have displaced him and substituted some one else. (King v. McLean, etc., Hospital (C. C. A. 1), 64 F. 331, 354, 355, 26 L. R. A. 784; Street, § 459.) Hence it was a matter of no moment to this suit what took place thereafter in Oklahoma. Bailey got no authority over the assets in New York by his letters in Oklahoma. (Hoyt v. Sprague, 103 U. S. 613, 631, 26 L. Ed. 585; Morgan v. Potter, 157 U. S. 195, 15 S. Ct. 590, 39 L. Ed. 670; Lamar v. Micou, 112 U. S. 452, 470, 5 S. Ct. 221, 28 L. Ed. 751; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153; Kraft v. Wickey, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569; Grimmett v. Witherington, 16 Ark.

377, 63 Am. Dec. 66.) Indeed, these were revoked, without effect upon this prosecution. He might have been enjoined, or prohibited, or otherwise prevented from taking action; it would have accomplished nothing. Barnett, and Barnett alone, was the plaintiff; the assets were here, and the District Court would and should have protected him by securing a proper substitute. After the intervention of the United States, this might, indeed, have been unnecessary, though in view of its relative inaction it would still have been wise.

So we cannot see how the appellees can be allowed anything for those services, and in so far as they entered into the allowance the mistake was one of law. The appellees argue that it was a reasonable precaution to contest these proceedings, whether necessary or no; but we cannot agree. We do not think that it was a precaution; to us the litigation seems plainly irrelevant. The appellees, being learned in the law, if not chareable with such a mistake, at least cannot make it a part of their claim here, for in fact they did not in this activity assist the prosecution at all. Besides, it is doubtful whether there was a mistake, for there was quite another reason why they have thought it important to keep Bailey a guardian. They had a contract with him for 40 per cent of the recovery, which they believed, perhaps rightly, was valid, and which depended upon his continued authority.

However, even after these services are excluded, there undoubtedly remained a large amount of labor necessarily involved in the prosecution. Barnett, who had the mentality of a child, could not help; he had been surrounded by those who meant only to fleece him; they would not help. The Department of the Interior would take no action, apparently believing that the money was better employed as it was than Barnett or his heirs could employ it. The evidence had to be drawn from unwilling sources, and the right was not altogether clear. Barnett, as a restricted Indian, was not legally competent to convey, however competent he might personally be judged by ordinary standards. Congress had put him under the tutelage of the Secretary; merely by virtue of his status, though, if the Secretary approved, this was removed. Doubtless the Secretary's approval, standing alone, was not a conveyance; we may also assume that a conveyance, defective even in its factum, would be the equivalent of none. But it was not clear that Barrett did not actually mean to convey, and, if he did, his gift was not void, but must be set aside because of his personal incapacity. It was possible that a court might hold that, being in any case non sui juris, his personal incapacity was a part of his status, and that once the Secretary had approved, acting upon the facts of his case, the gift was valid. We think that the hazard was substantial.

The allowance depends in part upon the amount at stake. Between February 1, 192–, when the gift was made, and November 21, 1927, when the decree was entered, the income falling due under the bonds was less than $140,000, though by how much we do not know, as the market value of the bonds was in some instances above par.

Of this Barnett during this period was entitled to about $96,000, regardless of the result, and the total amount involved was therefore substantially less than $600,000. If there be a rule in the District Court that in such cases allowances shall be made upon a basis of one-third of the amount involved, we do not know it and we disapprove it; it certainly has never had our sanction. We do not mean, of course, that a percentage basis is in itself improper; but it cannot be fixed at the same rate for all cases regardless of the amount. The allowance is a payment for legal services, not a speculative interest in a lawsuit. It does not appear whether the district judge included the Oklahoma litigation with the rest, though we should have expected him to say that he did not, if that were so. Whether he did or not, we think the allowance plainly too large.

It is argued that we should not disturb it, unless there has been an abuse of discretion. Perhaps so, but that phrase means no more than that we will not intervene, so long as we think that the amount is within permissible limits; if our conviction is definite that it is, we cannot properly abdicate our judgment. Had the result been certain, we should have thought $50,000 enough for the work involved, excluding the Oklahoma litigation. As the hazard was real, for the reasons we have given, we think that $100,000 might be allowed, but that appears to us the utmost that could be. It is idle to go into details; such matters are proverbially uncertain, and men will undoubtedly differ about them; but we think it of much importance that in cases of the kind the inducement shall be kept within limits.

376

The allowance to Bailey we will not disturb.

Award reduced to $100,000 and expenses; decree otherwise affirmed.

377 In United States Circuit Court of Appeals, Second Circuit

JACKSON BARNETT, PLAINTIFF

v.

EQUITABLE TRUST COMPANY OF NEW YORK ET AL., DEFENDANTS

UNITED STATES, APPELLANT

Decree

Filed July 22, 1929

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court and as so modified is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

378 [File indorsement omitted.]

379–388 [Petition for rehearing, covering 10 pages, filed Aug. 12, 1929, omitted from this print. It was denied, and nothing more, by order Sept. 18, 1929.]

389 In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the post-office building, in the city of New York, on the 18th day of September, one thousand nine hundred and twenty-nine.

[Title omitted.]

Order denying rehearing

Filed Sept. 19, 1929

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

WM. PARKIN, *Clerk.*

390 [File endorsement omitted.]

391 [Clerk's certificate to foregoing transcript omitted in printing.]

392 Supreme Court of the United States

Order allowing certiorari

Filed January 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of

the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34,661. U. S. Circuit Court of Appeals, Second Circuit. Term No. 530. The United States of America, petitioner, vs. The Equitable Trust Company of New York, Murray, Aldrich & Roberts, Edward J. Patterson, et al. Petition for writ of certiorari and exhibit thereto. Filed December 18, 1929. File No. 34,661.

U. S. GOVERNMENT PRINTING OFFICE